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No. 3005

United States ¹¹⁰⁶
Circuit Court of Appeals
For the Ninth Circuit. /

H. F. DANGBERG LAND & LIVESTOCK COM-
PANY,

Plaintiff in Error,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing
business under the firm name and style of
DAY and FOSTER,

Defendants in Error.

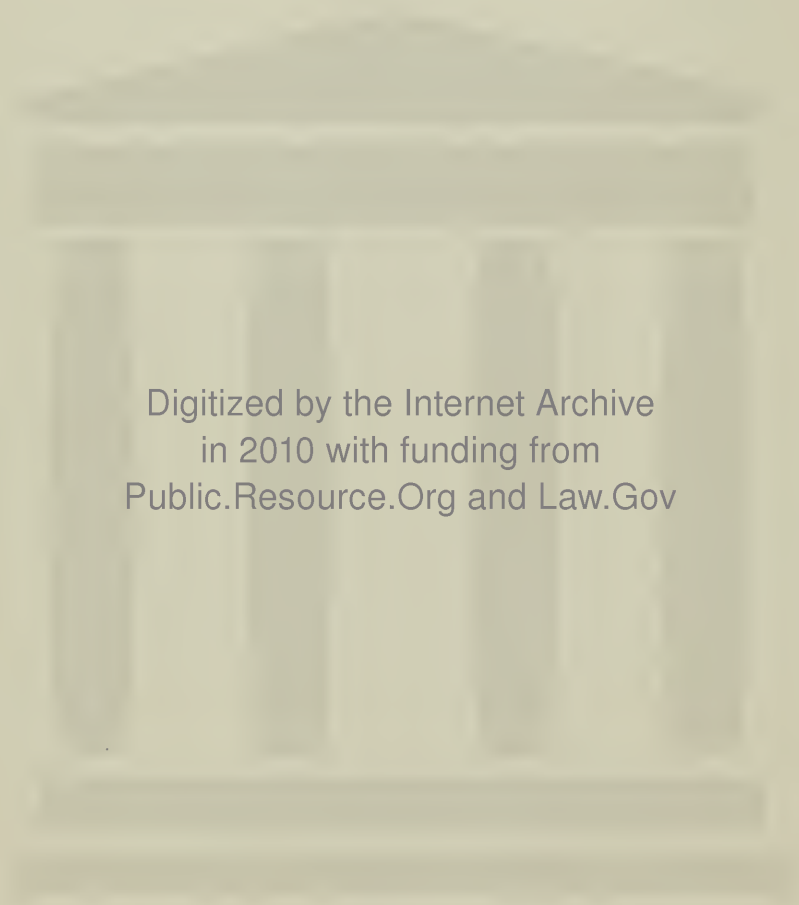
Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

Filed

JUN 4 - 1917

F. D. Monckton,
Clerk.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original record is printed and **cancelled** herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

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For Defendants and Appellees:

J. H. MERRIAM, Esq., Pasadena, Cal.;

HUNSAKER & BRITT, LEROY M. EDWARDS, JOSEPH L. LEWINSOHN, Esqs., 1132-1143 Title Insurance Building, Los Angeles, Cal.

Civil No. 299.

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

H. F. DANGBERG LAND & LIVESTOCK COM-
PANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing
business under the firm name and style of
DAY and FOSTER,

Defendants.

Citation on Appeal.

Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, state of California, on the 3rd day of May, 1917, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States, in and for the Southern District of California, Southern Division, from a final decree signed, filed and entered on the 19th day of September, 1916, in that certain suit being case No. Civil No. 299, wherein the Dangberg Land and Livestock Company is plaintiff and you are defendant and appellee, to show cause, if any there be, why the decree against said defendant, as in said order allowing the appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable Oscar Trippet, United States judge for the District Court of the United States, in and for the Southern District of California, Southern Division, this 4th day of April, 1917, and of the independence of the United States 141st.

OSCAR A. TRIPPET,

United States District Court in and for the Southern District of California, Southern Division.

Civil No. 299.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY and FOSTER,

Defendants.

Affidavit of Service.

John McK. Marble, being first duly sworn, on oath says: That he is and was, at the time of the service of the paper herein referred to, a citizen of the United States, over the age of twenty-one years, and not a party to the within entitled action; that he received the annexed citation on the 4th day of April, 1917, and on the same day duly served the same upon the defendant H. C. Day, by delivering to and leaving with J. H. Merriam, Joseph L. Lewinsohn, Hunsaker &

Britt and Leroy M. Edwards, the attorneys of record of said defendant, in the city of Los Angeles, county of Los Angeles, state of California, a full, true and correct copy of said citation.

JOHN McK. MARBLE.

Subscribed and sworn to before me this 13th day of April, 1917.

(Seal)

ROBERT A. ETIE,

Notary Public in and for said County of Los Angeles, State of California.

[Endorsed]: Civil No. 299. In the District Court of the United States, in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster, defendants. Citation on appeal. Received a copy of the within citation this 4th day of April, 1917. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt and Le Roy M. Edwards, attys. for deft. Day. Filed Apr. 19, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, California, attorney for plaintiff.

Writ of Error.

Civil 299.

United States of America—ss.

The President of the United States, to the Honorable Oscar A. Trippet, judge of the United States District Court, Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, which is in the said District Court, before you, between H. F. Dangberg Land & Livestock Company, plaintiff in error, and H. C. Day and S. A. Foster, defendants, a manifest error hath happened, to the damage of said Dangberg Land and Livestock Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings thereof, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the state of California, where said court is sitting, on or before the 4th day of May, 1917, in the said Circuit Court of Appeals, to be then and there held, and that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 26th day of April, 1917.

(Seal) WM. M. VAN DYKE,
Clerk of the United States District Court for the
Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

The above writ of error is hereby allowed this 26th day of April, 1917.

TRIPPET,
Judge.

I hereby certify that a copy of the within writ of error was on the 26th day of April, 1917, lodged in the clerk's office of the United States District Court for the Southern District of California, Southern Division, for said defendant in error.

WM. M. VAN DYKE,
Clerk United States District Court, Southern District
of California.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: 299 Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division. *H. F. Dangberg Land & Livestock Company*, plaintiffs, vs. *H. C. Day and S. A. Foster*, co-partners doing business under the firm name and style of *Day and Foster*, defendants. Writ of error. Filed Apr. 26, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Olin Wellborn, Jr., and Stephen Monteleone, attorneys for plaintiff.

*In the District Court of the United States, for the
Southern District of the State of California,
Southern Division.*

H. F. DANGBERG LAND and LIVESTOCK COM-
PANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing
business under the firm name and style of DAY
& FOSTER,

Defendants.

Complaint.

To the Honorable, the Judge of the District Court of the United States, for the Southern District of the state of California:

H. F. Dangberg Land & Livestock Company, as hereinbefore stated, brings this, its complaint, against H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster, defendants:

And your plaintiff complains and alleges as follows:

I.

That plaintiff is and for more than ten years hence hitherto has been a corporation duly created and organized and existing under and by virtue of the laws of the state of Nevada and is a citizen and resident of the state of Nevada.

II.

That defendant H. C. Day is a citizen and resident of the city of Pasadena, county of Los Angeles, state of California.

III.

That defendant S. A. Foster is a citizen and resident of the town of Duncan, county of Greenlee, state of Arizona.

IV.

That defendants H. C. Day and S. A. Foster are co-partners, doing business under the firm name and style of Day & Foster.

V.

That Highland Cattle Company is, and for more than six months hence hitherto has been a corporation

duly created and organized and existing under and by virtue of the laws of the state of Nevada and is a citizen and resident of the state of Nevada.

VI.

That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was in the employ of the Highland Cattle Company. That on or about the 17th day of March, 1913, at the town of Lordsburg, state of New Mexico, the said J. C. Dodson informed the secretary of said Highland Cattle Company that he, the said J. C. Dodson, could purchase of defendants all of defendants' cattle, horses, lands and cattle business equipment, situated and located in the states of Arizona and New Mexico, the cattle to count at least nine thousand head with young calves thrown in and not counted, for the sum of two hundred and fifty thousand dollars (\$250,000).

That said secretary of said Highland Cattle Company informed said J. C. Dodson that if defendants would guarantee to deliver nine thousand head of cattle, with young calves thrown in and not counted, the said secretary of said Highland Cattle Company would endeavor to have it purchase the cattle, horses, lands and cattle business equipment of defendants, situated in the states of Arizona and New Mexico, for the sum of two hundred and fifty thousand dollars (\$250,000).

VII.

That on or about the 30th day of March, 1913, the said J. C. Dodson met the president and secretary of said Highland Cattle Company at the city of Reno,

state of Nevada, and delivered to them a draft of agreement, as follows, viz.:

“AGREEMENT.

“This agreement made this 25th day of March, in the year of our Lord one thousand nine hundred thirteen, between Day & Foster, of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of Day & Foster, party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, party of the second part, witnesseth:

“That for and in consideration of the sum of twenty thousand (\$20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto said party of the second part all cattle, horses, real estate and farming implements mentioned in the deed hereto attached, and the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand (\$230,000) dollars, lawful money of the United States, said sum to be paid on or before the 20th day of June, 1913.

“The said party of the first part guarantees there to be nine thousand (9,000) head of cattle, calves from October, 1912, not to be counted. The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned and said party of

the first part guaran-”“tees that all property mentioned in said papers is free from all incumbrances whatsoever kind and that they have a good and perfect title to the same. The deed hereto attached covers one thousand (1,000) acres of land, more or less. The bill of sale hereto attached covers nine thousand (9,000) head of cattle and ninety head of horses. The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

“In witness whereof the said parties of this agreement have hereunto set their hands and seals March 25th, 1913.

.....
.....
.....”

That at the time said J. C. Dodson delivered to said president and secretary of said Highland Cattle Company said draft of agreement, he stated to them that the said defendants had executed a copy thereof and that he had signed the same as manager of said Highland Cattle Company; that the said signed instrument, together with a deed of defendants’ lands covering 1000 acres of land more or less, and a bill of sale covering 9000 head of cattle, calves from October, 1912, thrown in and not counted, 90 head of horses, farming implements and cattle business equipment, all duly made and executed by the defendants and attached to said signed agreement, had been deposited in escrow in the Bank of Duncan, in the town of Duncan, state of Arizona, in accordance with the terms of said draft of agreement above set forth.

VIII.

That on the 31st day of March, 1913, said Highland Cattle Company, at the town of Minden, state of Nevada, received from said J. C. Dodson, through the United States mail, an instrument in the words and figures following:

“HIGHLAND CATTLE CO.

Minden, Nev.

March 25, 1913.

Bought of Day and Foster the following:

No. Head	Live Stock	Weight	Price	Amount
----------	------------	--------	-------	--------

All their cattle, horses and land in Arizona and N. M. amt. of this check 20,000.00 there are to be 9000 cattle above October calves about 90 horses and 1000 acres or more deed land all leases etc. Above live stock to be delivered f. o. b. cars—191 and hereby acknowledge receipt of \$20,000.00.

H. C. DODSON,

DAY & FOSTER,

Buyer.

Seller.”

IX.

That afterwards, on the said 31st day of March, 1913, the Farmers Bank of Carson Valley, at the town of Minden, state of Nevada, presented to said Highland Cattle Company for payment the following draft, viz.:

“Highland Cattle Company. 8048 No. 112

March 25, 1913.

Pay to the order of Day and Foster.....\$20,000.00

twenty thousandno-100 dollars

J. C. DODSON,

Buyer.

Dealers and growers of live stock, Minden, Nevada.

Please forward Farmers Bank, Carson Valley, Carson, Nevada.

Farmers Bank of Carson Valley, Inc.

Paid Mar. 31, 1913.

Minden.....Nevada.”

Endorsed: “Day & Foster. Pay to the order of any bank or banker all prior endorsements guaranteed. The Bank of Duncan 91-64 Duncan Ariz. 91-64. B. R. Lanneau, cashier. For collection. Pay to the order of any bank or banker Mar. 28, 1913. The Crocker National Bank of San Francisco.” (The word “Paid” perforated through draft.)

X.

That at the time said draft of agreement hereinbefore described in subdivision VII hereof was delivered to the president and secretary of said Highland Cattle Company as aforesaid, they believed it to be a true copy of an original agreement deposited in escrow with the said Bank of Duncan, and also believed to be true the statements made to them by said J. C. Dodson that an original copy of said draft of agreement had been executed by defendants and that a deed or deeds covering 1000 acres of land, more or less, and a bill of sale covering 9000 head of cattle, calves from October, 1912, not to be counted, and 90 head of horses, and farming implements, had been made, executed and delivered by defendants to said Bank of Duncan, in accordance with the terms of said draft of agreement; that on the 31st day of March, 1913, said president and secretary of said Highland Cattle Company believed to have been executed in the words and

figures as set forth in subdivision VIII hereof, the instrument received by said Highland Cattle Company and signed by defendants.

That, believing to be true said statements of said J. C. Dodson, and believing a draft of agreement, a copy of which is set forth in subdivision VII hereof had been executed by said defendants, and believing said instrument, a copy of which is set forth in subdivision VIII hereof had been executed by defendants in the words and figures as it was received by it, said Highland Cattle Company honored and paid the aforesaid draft described in subdivision IX hereof, by paying to the said Farmers Bank of Carson Valley for defendants, at said town of Minden, the sum of twenty thousand dollars.

XI.

That on the 24th day of May, 1913, at the town of Lordsburg, state of New Mexico, the said defendant S. A. Foster admitted to the president and secretary of said Highland Cattle Company that the instrument, a copy whereof is set forth in subdivision VIII hereof, was true and correct and had been executed by said Day and Foster, co-partners, by him as one of said partners; also, that the draft of agreement described in subdivision VII hereof he thought was practically a true copy of the original agreement deposited with the said Bank of Duncan and executed by defendants and by said J. C. Dodson as purported manager of said Highland Cattle Company. Thereupon said president and secretary of said Highland Cattle Company notified said S. A. Foster that the said Highland Cattle Company was willing and ready to receive and

accept said property described in said draft of agreement set forth in subdivision VII hereof, and to pay defendants the balance of the purchase price therefor.

XII.

That on or about 4 o'clock p. m. of the 26th day of May, 1913, at said town of Lordsburg, state of New Mexico, said president and secretary of said Highland Cattle Company by and from certain acts done and statements made by both said J. C. Dodson and the said defendant S. A. Foster, became suspicious that the draft of agreement described in subdivision VII hereof was not a true and correct copy of the purported signed copy held in escrow by the said Bank of Duncan, as aforesaid, and requested the said defendant S. A. Foster to forthwith accompany one of the officers of said Highland Cattle Company to the said town of Duncan and examine all said papers and instruments held in escrow by the said Bank of Duncan relating to the transaction, and he consented to start at once with the secretary of said Highland Cattle Company; that notwithstanding the secretary of said Highland Company immediately had an automobile in readiness to make said trip and notified said defendant, S. A. Foster, he, the said defendant S. A. Foster, delayed starting from said town of Lordsburg until about 6 o'clock p. m. of said day, and between the hours of 4 o'clock p. m. and 6 o'clock p. m. of said day, had many conferences with said J. C. Dodson; that finally, and after much urging, the said S. A. Foster and the secretary of said Highland Cattle Company made said trip to said town of Duncan, and were shown by the manager of said Bank of Duncan

the signed instrument in the words and figures following:

“This agreement, made this twenty-fifth day of March in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent for said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, the party of the second part, witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 (\$20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all” “cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached. And the said party of the second part agrees to pay the said party of the first part the further sum of two hundred and thirty thousand & 00/100 (\$230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned. And the said party of the first part hereby guarantees that all property mentioned in said papers

is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less.

The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

(Signed) DAY & FOSTER,
S. A. FOSTER.

(Signed) J. C. DODSON,
Manager Highland Cattle Co.”

And also, at the same time and place, were shown a bill of sale executed by defendants by S. A. Foster, agent, purporting to sell to the said Highland Cattle Company all cattle branded with certain brands and marks, also certain farming implements; that said instrument did not state or specify the number of cattle sold; that immediately after said last named instruments had been examined and read by the secretary of said Highland Cattle Company, the said defendant S. A. Foster stated to said secretary that the following words and figures set forth in that certain instrument described in subdivision VIII hereof, were false and fraudulent, viz.: “there are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land all leases, etc,” and had been inserted

above the signature of defendants after it had been executed by them; and at the same time and place, said defendant S. A. Foster stated to said secretary that defendants did not own or possess on the 25th day of March, 1913, or at any time since said day, on their cattle ranges in Arizona and New Mexico, 9000 head of cattle, or any number exceeding about 7000 head, and that defendants could not deliver to said Highland Cattle Company a greater number of cattle, including young calves, than 7000 head.

That thereupon, the secretary of said Highland Cattle Company immediately stated to said defendant S. A. Foster that the said Highland Cattle Company repudiated and disaffirmed said purported contract above described in this subdivision, and that said Highland Cattle Company demanded the repayment to it of the aforesaid sum of twenty thousand dollars (\$20,000) paid to defendants as hereinbefore alleged.

XIII.

That thereafter and on the 7th day of June, 1913, said Highland Cattle Company in writing demanded of defendants the repayment of it of said sum of twenty thousand dollars.

XIV.

That said J. C. Dodson had no power or authority expressed or implied, to bind said Highland Cattle Company to any agreement for the purchase of said lands, cattle or other property of said defendants.

That said Highland Cattle Company never accepted nor ratified the instrument set forth in subdivision XII hereof.

XV.

That heretofore, and on the 16th day of January, 1914, the said Highland Cattle Company for value, sold, assigned and transferred its said claim or account against defendants in the sum of twenty thousand dollars to said H. F. Dangberg Land and Livestock Company, said plaintiff herein, and it is now the owner and holder thereof.

XVI.

That no part of said sum of twenty thousand dollars has been paid by said defendants or either of them, and the whole amount thereof, with interest from the 31st day of March, 1913, at the rate of seven per cent per annum, is now due, owing and unpaid from said defendants and each of them to this plaintiff.

Wherefore, plaintiff prays judgment against said defendants and each of them for the sum of twenty thousand dollars lawful money of the United States, with interest thereon from the 31st day of March, 1913, at the rate of seven per cent per annum and for such other and further relief in the premises as to the court shall seem just and equitable.

MADISON MARINE,

WM. M. SIMS,

Attorneys for Plaintiff.

Dated, January 16th, 1914.

State of Nevada, County of Douglass—ss.

Personally appeared before the undersigned authority, H. F. Dangberg, known to the undersigned to be the secretary of the complainant, the H. F.

Dangberg Land and Livestock Company, a corporation, who being duly sworn as to the truth of the allegations made in the above complaint, says that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes them to be true; that he makes this verification for and in behalf of said complainant corporation.

H. F. DANBERG.

Subscribed and sworn to before me this 16th day of January, A. D. 1914.

(Seal)

J. A. CARDINAL,

Notary Public in and for the County of Douglass,
State of Nevada.

[Endorsed]: Original. No. 299 Civ. Dep't.
In the District Court of the United States for the Southern District of the state of California, Southern Division. H. F. Dangberg Land and Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, etc., defendants. Complaint. Filed Jan. 23, 1914. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. William M. Sims, attorney at law. Suite 515 Kohl Building, attorney for plaintiff.

*United States of America, District Court of the
United States, Southern District of California,
Southern Division.*

H. F. DANBERG LAND AND LIVESTOCK
COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, etc.,
Defendants.

Summons.

Action brought in the said District Court, and the complaint filed in the office of the clerk of said District Court, in the city of Los Angeles, county of Los Angeles, state of California.

The President of the United States of America, Greeting:

To H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the United States, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Los Angeles, county of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

And you are hereby notified that unless you appear and plead, answer or demur, as herein required, the plaintiff will take judgment for any money or damages demanded in the complaint as arising from contract or will apply to the court for any further relief demanded in the complaint.

Witness, the Honorable Olin Wellborn, judge of the District Court of the United States, in and for the Southern District of California, this 23rd day of January, in the year of our Lord one thousand nine

hundred and fourteen and of our Independence the one hundred and thirty-eighth.

(Seal)

WM. M. VAN DYKE,

Clerk.

By LESLIE S. COLYER,

Deputy Clerk.

United States Marshal's Office,

Southern District of California.

I hereby certify, that I received the within writ on the 27th day of January, 1914, and personally served the same on the 2 day of February, 1914, by delivering to and leaving with H. C. Day, said defendant named therein, personally, at the county of Los Angeles city, in said district, a certified copy thereof, together with a copy of the complaint, certified to by Wm. M. Van Dyke, attached thereto.

LEO V. YOUNGWORTH,

U. S. Marshal.

By E. DINGLE,

Deputy.

Los Angeles, February 2, 1914.

[Endorsed]: Marshal's Civil Docket No. 2329. No. 299 Civil. U. S. District Court, Southern District of California, Southern Division. H. F. Dangberg Land and Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, etc., defendants. Summons. Filed Feb. 2, 1914. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Madison Marine, Esq., and Wm. M. Sims, plaintiff's attorney. 2 Com. L. R. B. 284.

No. 299. Civil.

*In the District Court of the United States in and for
the Southern District of California, Southern Di-
vision.*

H. F. DANGBERG LAND & LIVESTOCK COM-
PANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing
business under the firm name and style of Day
& Foster,

Defendants.

Demurrer of Defendant H. C. Day to Complaint.

Now comes defendant, H. C. Day, and demurs to the complaint of plaintiff in the above entitled action, on the following grounds:

1. That said complaint does not set forth facts sufficient to constitute a cause of action against this defendant.

2. That said complaint is uncertain in the following particulars:

(a) It cannot be ascertained therefrom whether or not plaintiff's assignor was in existence as a corporation at the time of the alleged transaction with the defendants, upon which the action is based.

(b) It cannot be ascertained therefrom what was the nature of the employment of J. C. Dodson by plaintiff's assignor as alleged in paragraph VI of plaintiff's complaint.

(c) It cannot be ascertained therefrom what was the extent of the power or authority of J. C. Dodson to act for and on behalf of plaintiff's assignor, in

the transactions upon which the complaint is based.

(d) It cannot be ascertained therefrom what were the acts or statements or the nature of the acts or statements which are alleged in paragraph XII to have caused suspicion, nor what connection, if any, the defendants or either of them had therewith.

(e) It cannot be ascertained therefrom what action, if any, was taken by plaintiff's assignor regarding the purchase by it of defendant's cattle and land, as set forth in said complaint, either before or after the date of the alleged sale and purchase, as set forth in paragraph XII of said complaint.

3. That said complaint is ambiguous in the several particulars in which it is specified in paragraph 2 hereof that the same is uncertain.

4. That said complaint is unintelligible in the several particulars in which it is specified in paragraph 2 hereof that the same is uncertain.

J. H. MERRIAM,

Attorney for Defendant H. C. Day.

[Endorsed]: Original. No. 299. Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners doing business under the firm name and style of Day & Foster, defendants. Demurrer of defendant, H. C. Day, to complaint. Service by copy acknowledged on Feb. 28, 1914. Wm. M. Sims, Madison Marine, attorneys for plff. Filed Feb. 28, 1914. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy. J. H.

Merriam, Pasadena, California, attorney for defendant Day.

Copy Minute Order.

At a stated term, to-wit: the January Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-fifth day of January, in the year of our Lord one thousand nine hundred and fifteen.

Present:

The Honorable Benjamin F. Bledsoe, District Judge.
H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.*, defendants. No. 229 Civil S. D.

This cause coming on this day to be heard on the demurrer of defendant H. C. Day to plaintiff's complaint; Wm. M. Sims, Esq., appearing as counsel for plaintiff; Fen Goodman, Esq., appearing as counsel for defendants; and said demurrer having been argued by counsel for the respective parties, and submitted to the court, it is by the court ordered that the general demurrer be, and the same hereby is overruled, and that the special demurrer to the complaint be, and the same hereby is sustained, with leave to plaintiff to amend within ten (10) days, if it shall be so advised, plaintiff, by its said counsel, waiving notice of the sustaining of said demurrer.

[Endorsed]: No. 299 Civil. United States District

Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company vs. H. C. Day *et al.* Copy minute order. Filed Sep. 22, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk.

In the District Court of the United States, for the Southern District of the State of California.

H. F. DANGBERG LAND AND LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY & FOSTER,

Defendants.

Amended Complaint.

To the Honorable, the Judge of the District Court of the United States, for the Southern District of the State of California:

By leave of court first had and obtained the H. F. Dangberg Land and Livestock Company, as hereinbefore stated, brings this, its amended complaint against H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendants:

And your plaintiff complains and alleges as follows:

I.

That plaintiff is and for more than ten years hence hitherto has been a corporation duly created and organized and existing under and by virtue of the laws

of the state of Nevada and is a citizen and resident of the state of Nevada.

II.

That defendant H. C. Day is a citizen and resident of the city of Pasadena, county of Los Angeles, state of California.

III.

That defendant S. A. Foster is a citizen and resident of the town of Duncan, county of Greenlee, state of Arizona.

IV.

That defendants H. C. Day and S. A. Foster are co-partners, doing business under the firm name and style of Day and Foster.

V.

That Highland Cattle Company ever since the 13th day of January, 1913, has been and now is a corporation duly created and organized and existing under and by virtue of the laws of the state of Nevada, and, during all the times herein mentioned was, and now is a citizen and resident of the state of Nevada.

VI.

That at all the times herein mentioned the said Highland Cattle Company was engaged in the business of cattle raising in the state of New Mexico. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was in the employ of the said Highland Cattle Company as manager of its cattle business in the state of New Mexico; that the only duties and powers of said J. C. Dodson, as such manager were to employ laborers for said Highland Cattle Company, necessary

to carry on its said cattle business and to discharge any of said laborers in his discretion, and to manage and direct said employees in the work necessary to conduct and carry on said cattle business. That on or about the 17th day of March, 1913, at the town of Lordsburg, state of New Mexico, the said J. C. Dodson informed the secretary of said Highland Cattle Company that he, the said J. C. Dodson, could purchase of defendants all of defendants' cattle, horses, lands and cattle business equipment, situated and located in the states of Arizona and New Mexico, the cattle to count at least nine thousand head with young calves thrown in and not counted, for the sum of two hundred and fifty thousand dollars (\$250,000).

That said secretary of said Highland Cattle Company informed said J. C. Dodson that if defendants would guarantee to deliver nine thousand head of cattle, with young calves thrown in and not counted, the said secretary of said Highland Cattle Company would endeavor to have it purchase the cattle, horses, lands and cattle business equipment of defendants, situated in the states of Arizona and New Mexico for the sum of two hundred and fifty thousand dollars (\$250,000).

VII.

That on or about the 30th day of March, 1913, the said J. C. Dodson met the president and secretary of said Highland Cattle Company at the city of Reno, state of Nevada, and delivered to them a draft of agreement, as follows, viz.:

"AGREEMENT.

"This agreement, made this 25th day of March in the year of our Lord one thousand nine hundred thirteen, between Day & Foster, of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of Day and Foster, party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, party of the second part, witnesseth:

"That for and in consideration of the sum of twenty thousand (\$20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto said party of the second part, all cattle, horses, real estate and farming implements mentioned in the deed hereto attached, and the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand (\$230,000) dollars, lawful money of the United States, said sum to be paid on or before the 20th day of June, 1913.

"The said party of the first part guarantees there to be nine thousand (9,000) head of cattle, calves from October, 1912, not to be counted. The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned and said party of the first part guarantees that all property mentioned in said papers is free from all incumbrances whatso-

ever kind and that they have a good and perfect title to the same. The deed hereto attached covers one thousand (1,000) acres of land, more or less. The bill of sale hereto attached covers nine thousand (9,000) head of cattle and ninety head of horses. The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

“In witness whereof the said parties of this agreement have hereunto set their hands and seals March 25th, 1913.

.....
.....
.....”

That at the time said J. C. Dodson delivered to said president and secretary of said Highland Cattle Company said draft of agreement, he stated to them that the said defendants had executed a copy thereof and that he had signed the same as manager of said Highland Cattle Company; that the said signed instrument, together with a deed of defendants' lands covering 1000 acres of land, more or less, and a bill of sale covering 9000 head of cattle, calves from October, 1912, thrown in and not counted, 90 head of horses, farming implements and cattle business equipment, all duly made and executed by the defendants and attached to said signed agreement, had been deposited in escrow in the Bank of Duncan, in the town of Duncan, state of Arizona, in accordance with the terms of said draft of agreement above set forth.

VIII.

That on the 31st day of March, 1913, said Highland Cattle Company, at the town of Minden, state of Nevada, received from said J. C. Dodson, through the United States mail, an instrument in the words and figures following:

“Highland Cattle Co.

Minden, Nev.

March 25, 1913.

Bought of Day and Foster the following:

No.	Head.	Livestock.	Weight.	Price.	Amount.
-----	-------	------------	---------	--------	---------

All their cattle, horses and land in Arizona and N. M., amt. of this check, 20,000.00
 There are to be 9000 cattle, above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc. Above livestock to be delivered f. o. b. cars191 and hereby acknowledge receipt of \$20,000.00.

H. C. DODSON,
 Buyer.

DAY & FOSTER,
 Seller.”

IX.

That afterwards, on the said 31st day of March, 1913, the Farmers Bank of Carson Valley, at the town of Minden, state of Nevada, presented to said Highland Cattle Company for payment the following draft, viz.:

“Highland Cattle Company.

8048

No. 112

March 25, 1913.

Pay to the order of Day and Foster \$20,000.00
Twenty thousand no-100 dollars.

J. C. DODSON,
Buyer.

Dealers and growers of livestock, Minden, Nevada.

Please forward Farmers Bank, Carson Valley, Carson, Nevada. Farmers Bank of Carson Valley, Inc.

Paid Mar. 31, 1913.

Minden Nevada.”

Endorsed: “Day & Foster. Pay to the order of any bank or banker, all prior endorsements guaranteed. The Bank of Duncan, 91-64. Duncan, Ariz. 91-64. B. R. Lanneau, cashier. For collection. Pay to the order of any bank or banker. Mar. 28, 1913. The Crocker National Bank of San Francisco.” (The word “Paid” perforated through draft.)

X.

That at the time said draft of agreement hereinbefore described in subdivision VII hereof was delivered to the president and secretary of said Highland Cattle Company as aforesaid, they believed it to be a true copy of an original agreement deposited in escrow with the said Bank of Duncan, and also believed to be true the statements made to them by said J. C. Dodson that an original copy of said draft of agreement had been executed by defendants and that a deed or deeds covering 1000 acres of land, more or less, and a bill of sale covering 9000 head of cattle, calves from October, 1912, not to be counted, and 90 head of horses, and farming implements, had been made, executed and delivered by defendants to said Bank of Duncan, in accordance with the terms of said

draft of agreement; that on the 31st day of March, 1913, said president and secretary of said Highland Cattle Company believed to have been executed in the words and figures as set forth in subdivision VIII hereof, the instrument received by said Highland Cattle Company and signed by defendants.

That, believing to be true said statements of said J. C. Dodson, and believing a draft of agreement, a copy of which is set forth in subdivision VII hereof had been executed by said defendants, and believing said instrument, a copy of which is set forth in subdivision VIII hereof had been executed by defendants in the words and figures as it was received by it, said Highland Cattle Company honored and paid the aforesaid draft described in subdivision IX hereof, by paying to the said Farmers Bank of Carson Valley for defendants, at said town of Minden, the sum of twenty thousand dollars.

XI.

That on the 24th day of May, 1913, at the town of Lordsburg, state of New Mexico, the said defendant S. A. Foster admitted to the president and secretary of said Highland Cattle Company that the instrument, a copy whereof is set forth in subdivision VIII hereof was true and correct and had been executed by said Day and Foster, co-partners, by him as one of said partners; also, that the draft of agreement described in subdivision VII hereof he thought was practically a true copy of the original agreement deposited with the said Bank of Duncan and executed by defendants and by said J. C. Dodson as purported manager of said Highland Cattle Company. There-

upon said president and secretary of said Highland Cattle Company notified said S. A. Foster that the said Highland Cattle Company was willing and ready to receive and accept said property described in said draft of agreement set forth in subdivision VII hereof, and to pay defendants the balance of the purchase price therefor.

XII.

That on or about 4 o'clock p. m. of the 26th day of May, 1913, at said town of Lordsburg, state of New Mexico, said president and secretary of said Highland Cattle Company requested the said defendant S. A. Foster to forthwith accompany one of the officers of said Highland Cattle Company to the said town of Duncan and examine all said papers and instruments held in escrow by the said Bank of Duncan relating to the transaction, and he consented to start at once with the secretary of said Highland Cattle Company; that notwithstanding the secretary of said Highland Cattle Company immediately had an automobile in readiness to make said trip and notified said defendant, S. A. Foster, he, the said defendant S. A. Foster, delayed starting from said town of Lordsburg until about 6 o'clock p. m. of said day, and between the hours of 4 o'clock p. m. and 6 o'clock p. m. of said day, had many conferences with said J. C. Dodson; that finally, and after much urging, the said S. A. Foster and the secretary of said Highland Cattle Company made said trip to said town of Duncan, and were shown by the manager of said Bank of Duncan the signed instrument in the words and figures following:

“This agreement, made this twenty-fifth day of March in the year of our Lord one thousand nine hundred and thirteen between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent for said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, the party of the second part, witnesseth:

That for and in consideration of the sum of twenty thousand and 00/100 (\$20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay the said party of the first part the further sum of two hundred and thirty thousand & 00/100 (\$230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned. And the said party of the first part hereby guarantees that all property mentioned in said papers is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less.

The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

(Signed) DAY & FOSTER,
S. A. Foster.

(Signed) J. C. DODSON,
Manager Highland Cattle Co.”

And also, at the same time and place, were shown a bill of sale executed by defendants by S. A. Foster, agent, purporting to sell to the said Highland Cattle Company all cattle branded with certain brands and marks, also certain farming implements; that said instrument did not state or specify the number of cattle sold; that immediately after said last named instruments had been examined and read by the secretary of said Highland Cattle Company, the said defendant S. A. Foster stated to said secretary that the following words and figures set forth in that certain instrument described in subdivision VIII hereof, were false and fraudulent, viz.: “there are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc.,” and had been inserted above the signature of defendants after it had

been executed by them; and at the same time and place, said defendant S. A. Foster stated to said secretary that defendants did not own or possess on the 25th day of March, 1913, or at any time since said day, on their cattle ranges in Arizona and New Mexico, 9000 head of cattle, or any number exceeding about 7000 head, and that defendants could not deliver to said Highland Cattle Company a greater number of cattle, including young calves, than 7000 head.

That thereupon, the secretary of said Highland Cattle Company immediately stated to said defendant S. A. Foster that the said Highland Cattle Company repudiated and disaffirmed said purported contract above described in this subdivision, and that said Highland Cattle Company demanded the repayment to it of the aforesaid sum of twenty thousand dollars (\$20,000) paid to defendants as hereinbefore alleged.

XIII.

That thereafter and on the 7th day of June, 1913, said Highland Cattle Company in writing demanded of defendants the repayment to it of said sum of twenty thousand dollars.

XIV.

That said J. C. Dodson had no power or authority expressed or implied, to bind said Highland Cattle Company to any agreement for the purchase of said lands, cattle or other property of said defendants.

That said Highland Cattle Company never accepted nor ratified the instrument set forth in subdivision XII hereof.

XV.

That heretofore, and on the 16th day of January, 1914, the said Highland Cattle Company for value, sold, assigned and transferred its said claim or account against defendants in the sum of twenty thousand dollars to said H. F. Dangberg Land and Livestock Company, said plaintiff herein, and it is now the owner and holder thereof.

XVI.

That no part of said sum of twenty thousand dollars has been paid by said defendants or either of them, and the whole amount thereof, with interest from the 31st day of March, 1913, at the rate of seven per cent per annum, is now due, owing and unpaid from said defendants and each of them to this plaintiff.

Wherefore, plaintiff prays judgment against said defendants and each of them for the sum of twenty thousand dollars lawful money of the United States, with interest thereon from the 31st day of March, 1913, at the rate of seven per cent per annum and for such other and further relief in the premises as to the court shall seem just and equitable.

MADISON MARINE,

WM. M. SIMS,

Attorneys for Plaintiff.

Dated: February 3, 1915.

State of California, City and County of San Francisco—ss.

Personally appeared before the undersigned authority, Wm. M. Sims, known to the undersigned to be

one of the attorneys of the complainant, the H. F. Dangberg Land and Livestock Company, a corporation, who being duly sworn as to the truth of the allegations made in the amended complaint, says that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true; that he believes this verification for and in behalf of said complainant corporation. That the reason one of the officers of said corporation does not make this affidavit for and in behalf of said complainant is that all of said officers are absent from the said city and county of San Francisco where affiant has his office; that the facts set forth in said amended complaint are within the knowledge of affiant.

WM. M. SIMS.

Subscribed and sworn to before me this 3rd day of February, A. D. 1915.

(Seal)

W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Original. No. 299. Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners doing business under the firm name and style of Day & Foster, defendants. Amended complaint. Received copy within amended complaint this 4th day February. J. H. Merriam & Hunsaker & Britt. Filed Feb. 4, 1915.

Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. William M. Sims, Crocker Bldg., San Francisco, Cal., attorney for plaintiff.

No. 299. Civil.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY & FOSTER,

Defendants.

Demurrer of Defendant H. C. Day to Amended Complaint.

Now comes defendant H. C. Day and demurs to the amended complaint in the above entitled action on the following grounds:

1. That the court has not jurisdiction of the cause of action stated in said complaint.
2. That the court has not jurisdiction to try said action against this defendant in the absence of the defendant S. A. Foster.
3. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

4. That said complaint is uncertain in the following particulars:

(a) It cannot be ascertained therefrom whether or not plaintiff's assignor was in existence as a corporation at the time of the alleged transaction with the defendants upon which the action is based.

(b) It cannot be ascertained therefrom what was the nature of the employment of J. C. Dodson by plaintiff's assignor as alleged in paragraph VI of plaintiff's complaint.

(c) It cannot be ascertained therefrom what was the extent of the power or authority of J. C. Dodson to act for and on behalf of plaintiff's assignor in the transactions upon which the complaint is based.

(d) It cannot be ascertained therefrom what were the acts or statements, or the nature of the acts or statements which are alleged in paragraph XII to have caused suspicion, nor what connection the defendants, or either of them, had therewith.

(e) It cannot be ascertained therefrom what action, if any, was taken by plaintiff's assignor regarding the purchase of defendants' cattle and land as set forth in said complaint, either before or after the date of the alleged sale and purchase, as set forth in paragraph XII of said complaint.

5. That said complaint is ambiguous in the several particulars in which it is specified in paragraph 4 hereof that the same is uncertain.

6. That said complaint is unintelligible in the several particulars in which it is specified in paragraph 4 hereof that the same is uncertain.

J. H. MERRIAM and
HUNSAKER & BRITT,
Attorneys for Defendant H. C. Day.

[Endorsed]: Original. No. 299. Civil. In the United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day et al., defendants. Demurrer of defendant H. C. Day to amended complaint. Service of the within demurrer is hereby admitted this 15th day of February, 1915. Madison Marine, P., attorney for plaintiff. Filed Feb. 15, 1915. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring streets, Los Angeles, Cal., attorneysh for deft. H. C. Day.

Copy Minute Order.

At a stated term, to-wit: the July Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Saturday, the twentieth day of November, in the year of our Lord one thousand nine hundred and fifteen.

Present:

The Honorable Benjamin F. Bledsoe, District Judge.

H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.*, defendants. No. 299 Civil S. D.

This cause having heretofore been submitted to the court for its consideration and decision on the demurrer of defendant H. C. Day to plaintiff's amended complaint; the court having duly considered the same, and being fully advised in the premises, now orally

announces its conclusions thereon, and it is ordered that said demurrer of defendant H. C. Day to plaintiff's amended complaint be, and the same hereby is overruled, and defendants assigned to answer said amended complaint within ten (10) days.

[Endorsed]: No. 299 Civil. United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company vs. H. C. Day *et al.* Copy minute order. Filed Sep. 22, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk.

In the District Court of the United States, for the Southern District of California, Southern Division, Ninth Circuit.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY & FOSTER,

Answer of Defendant H. C. Day.

Comes now H. C. Day, one of the defendants named in the above-entitled action, and, without waiving his general and special demurrer to the amended complaint in the above-entitled action and his objections to the jurisdiction of the court, but expressly reserving the right to the full benefit thereof at any time during the progress of this action, and protesting against being further required to answer the amended

complaint, severing himself from his co-defendant herein, for separate answer to said complaint, admits, denies and alleges as follows:

1. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph one of said complaint, and basing his answer upon said ground, he denies the same.

2. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph five of said complaint, and basing his answer upon said ground, denies the same.

3. Admits that at all times mentioned in said complaint the Highland Cattle Company was engaged in the business of cattle raising in the state of New Mexico, and alleges that at all such times it was also engaged in the business of purchasing lands and ranches and buying and selling cattle. Admits that for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was in the employ of said Highland Cattle Company as manager of its cattle business in the state of New Mexico, and he is informed and believes, and therefore alleges, that during such time said Dodson was a director of the said Highland Cattle Company and vice-president and manager thereof and the owner of approximately one-third of the capital stock thereof, and with one H. F. Dangberg and one F. E. Humphreys had domination and control over said Highland Cattle Company, and said Dodson was the duly authorized manager and resident agent of said corporation for the states of New Mexico and Arizona, with residence fixed at Lordsburg, New Mexico, and was

the duly authorized agent of said company to purchase lands and ranches and to buy and sell cattle in said state of New Mexico and in the state of Arizona, and for said corporation to receive service of process. Denies that the only duties and powers, or the only duties or powers of said J. C. Dodson as such manager, or otherwise, were to employ laborers for said Highland Cattle Company necessary to carry on its said cattle business, or otherwise, or to discharge any of such laborers in his discretion, or to manage and direct said employees in the work necessary to conduct and carry on said cattle business, or otherwise. Alleges that he has no information or belief sufficient to enable him to answer any of the allegations contained in that portion of paragraph six of plaintiff's complaint, beginning with the word "that" in line 27 of page 2 thereof, to and including the figures \$250,000" in line 12 of page 3 thereof, and basing his answer upon said ground, denies the same.

4. Alleges that he has no information or belief sufficient to enable him to answer any of the allegations contained in paragraph seven of plaintiff's complaint, and basing his answer upon said ground, denies the same.

Alleges that if the purported draft of agreement set out in paragraph seven was delivered to the president and secretary of the Highland Cattle Company, as alleged in paragraph seven of said complaint, that said secretary and president of said Highland Cattle Company knew, or in the exercise of reasonable care would have known that said purported draft of agreement was not a true copy of the agreement executed by said

defendants as parties of the first part and by the said Dodson on behalf of said Highland Cattle Company as party of the second part.

5. Alleges that he has no information or belief sufficient to enable him to answer any of the allegations contained in paragraph eight of plaintiff's complaint, and basing his answer upon said ground, denies the same.

Alleges that if the Highland Cattle Company received the paper writing referred to in paragraph eight of said complaint in the words and figures there set out, he is informed and believes and therefore alleges that the following words, to-wit: "there are to be 9000 cattle above October calves about 90 horses and 1000 acres or more deed land all leases etc." were written in a different hand and with different ink than the remainder of said instrument, and in the handwriting of said Dodson, and said Highland Cattle Company knew, or in the exercise of reasonable care would have known that said language quoted was an interpolation and spurious.

6. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph nine of said complaint, and basing his answer upon said ground, denies the same, but admits that there was presented to said Highland Cattle Company in due course a draft the tenor and effect of which was substantially in the words and figures set forth in said paragraph nine.

7. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph ten of said complaint, and basing his

answer upon said ground, denies the same; except that this defendant admits that said Highland Cattle Company honored and paid in due course the draft referred to in paragraph nine of said complaint.

Alleges that at the time said Highland Cattle Company honored and paid said draft it had notice, or in the exercise of reasonable care would have known, that the paper writing set out in paragraph seven of said complaint purported to be a copy of a certain agreement in writing entered into by the said J. C. Dodson on behalf of said Highland Cattle Company on the one part and said Day & Foster on the other, the original of which was then deposited in escrow with the Bank of Duncan, in the town of Duncan, state of Arizona; and said Highland Cattle Company had notice, or in the exercise of reasonable care would have known that said purported copy was false and fraudulent, in that by its terms the said Day and Foster were represented as agreeing to sell and convey 9,000 head of cattle, as will more particularly appear by the terms of said agreement hereinafter set out.

Alleges that said Highland Cattle Company had notice, or in the exercise of reasonable care would have known, that the said paper writing set out in paragraph eight of said complaint purported to be a receipt for \$20,000 as the consideration paid said Day & Foster for their promise to enter into the contract above referred to, and he is informed and believes and therefore alleges that said Highland Cattle Company had notice, or in the exercise of reasonable care would have known, that the following portion of said paper writing, to-wit, "there are to be 9000 cattle above Oc-

tober calves about 90 horses and 1000 acres or more deed land all leases etc." was written in a different hand and with different ink than the remainder of said paper writing, and said Highland Cattle Company knew, or in the exercise of reasonable care would have known, that said language quoted was spurious and an interpolation.

8. Denies that on the 24th day of May, 1913, at the town of Lordsburg, state of New Mexico, or at any other time or place, the defendant S. A. Foster admitted to the president and secretary or the president or secretary of the said Highland Cattle Company, or to any other person, that the instrument, a copy whereof is set forth in paragraph eight of said complaint, was true and correct or true or correct or had been executed by said Day & Foster, co-partners, by him as one of said co-partners, or otherwise. Denies that said Foster then and there, or at all, admitted that the copy of the agreement described in paragraph seven of said complaint was practically a true copy, or a true copy, or a copy of the original agreement deposited with said Bank of Duncan and executed by defendants, or either of them, and by said J. C. Dodson as manager of said Highland Cattle Company, or by said Highland Cattle Company. Denies that thereupon, or at all, said president and secretary, or said president or secretary of said Highland Cattle Company, or said Highland Cattle Company, notified said Day & Foster, or this defendant, that said Highland Cattle Company was willing and ready, or willing or ready, to receive and accept, or receive, or accept, said property described in said copy of agreement set forth in paragraph seven

of said complaint, or to pay defendants the balance of the purchase price therefor.

9. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in that portion of paragraph twelve of the said complaint beginning with the first word in said paragraph to and including the words "by them" in line 18 of page 8 of said complaint, and basing his answer on that ground, denies the same.

Denies that at the time and place referred to in paragraph 12 of said complaint, or at any other time or place, or at all, said S. A. Foster stated to said secretary, or any other person, that the defendants did not own or possess on the 25th day of March, 1913, or at any time since said day, on their cattle ranches in Arizona and New Mexico, nine thousand head of cattle, or any number exceeding about seven thousand head, or that said S. A. Foster stated to said secretary, or any other person, that defendants could not deliver to said Highland Cattle Company a greater number of cattle, including young calves, than seven thousand head.

Denies that at the time referred to in paragraph twelve of said complaint, or at any other time, the secretary of said Highland Cattle Company, or said Highland Cattle Company, stated to said defendant S. A. Foster that said Highland Cattle Company disaffirmed the contract entered into between the Highland Cattle Company and Messrs. Day & Foster.

10. Denies that said J. C. Dodson had no power or authority, express or implied, to bind said Highland Cattle Company to any agreement for the purchase of

said lands, cattle or other property of said defendants, and he is informed and believes and therefore alleges that said J. C. Dodson had full authority in the premises to bind said Highland Cattle Company, and did bind said Highland Cattle Company to the agreement entered into between himself as manager of said Highland Cattle Company and said defendants.

Denies that said Highland Cattle Company never accepted or ratified the instrument set forth in paragraph twelve of said complaint, and alleges that said Highland Cattle Company did accept and ratify said instrument, and is now and forever barred and estopped from questioning or repudiating the same.

11. Alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph fifteen of said complaint, and basing his answer upon said ground, denies the same.

12. Denies that the sum of \$20,000, or any part thereof, with interest from the 31st day of March, 1913, or from any other date, or at all, at the rate of seven per cent per annum, or at any other rate, or at all, is now due and owing, or due, or owing, from said defendants, or either of them, to said plaintiff.

As a further, separate and distinct answer and defense to plaintiff's complaint, defendant alleges:

1. That he is informed and believes, and therefore alleges, on or about the 13th day of January, 1913, one J. C. Dodson, residing at Lordsburg, New Mexico, one Frank E. Humphrey, residing at Reno, Nevada, and one H. F. Dangberg, residing at Carson City, Nevada, at the town of Minden, in the state of Nevada, orally agreed to enter into, and did enter into, a joint adven-

ture for profit, the object and purpose of which adventure was to secure control by purchase, or otherwise, of ranches, large areas of land and cattle and stock in the states of New Mexico and Arizona.

2. That he is informed and believes, and therefore alleges, in furtherance of said purpose said Dodson, Humphrey and Dangberg on about the date last above mentioned caused to be organized a corporation under and by virtue of the laws of the state of Nevada known as the Highland Cattle Company, that the capital stock of said corporation was divided into two hundred thousand shares, of which said Dodson, Humphrey and Dangberg each held 66,666 shares, the remaining two shares being qualifying shares; that the directorate of said corporation consisted of five members, including said Dodson, Humphrey and Dangberg. Said corporation carried on business in the states of New Mexico and Arizona. On January 29, 1913, said Highland Cattle Company caused to be filed with the secretary of state of the state of New Mexico, and thereafter to be published, a certificate stating that the principal office and place of business of said Highland Cattle Company was in Lordsburg, New Mexico, and that the said J. C. Dodson was the duly elected, qualified and acting resident agent of said corporation for the state of New Mexico, and in charge of said principal office and place of business.

3. That he is informed and believes, and therefore alleges, said corporation was under the domination and control of said Dodson, Humphrey and Dangberg, and was used merely as a device and agency to enable them

to further the before mentioned joint adventure for profit.

4. That he is informed and believes, and therefore alleges, said Dodson was the managing agent of said corporation and of said syndicate composed of himself and said Dangberg and Humphrey, and as such, duly authorized to purchase tracts of land, ranches, cattle, stock and other like property, and, as such agent, said Dodson between the 13th day of January, 1913, and the 23rd day of May, 1913, did purchase for the Highland Cattle Company and said syndicate divers tracts of land, ranches, cattle, stock and other like property, and said purchases by said Dodson were well known to this defendant.

5. That on or about the 25th day of March, 1913, at the town of Lordsburg, in the state of New Mexico, the defendant S. A. Foster, acting in behalf of the co-partnership of Day & Foster, consisting of said Foster and this defendant, entered into an agreement in writing with said J. C. Dodson as agent of the Highland Cattle Company, which is in the words and figures following, to-wit:

“This agreement, made this twenty-fifth day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent for said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company of Minden, Nevada, party of the second part,

Witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 (\$20,000.00) dol-

lars lawful money of the United States in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, etc. mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand & 00/100 (\$230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrance of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

Said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agree-

ment have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER,

S. A. FOSTER,

J. C. DODSON,

Manage. Highland Cattle Co.

State of Arizona, County of Greenlee—ss.

Before me, B. R. Lanneau, a notary public in and for the county of Greenlee, state of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster, and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.)

(Notarial Seal)

B. R. LANNEAU,

Notary Public.”

Said agreement, and the deed and bill of sale therein referred to were forthwith placed in escrow with the Bank of Duncan in the town of Duncan, state of Arizona. That on said 25th day of March, 1913, said Highland Cattle Company had notice, or in the exercise of reasonable care would have known, of the contents of said documents so, as aforesaid, placed in escrow.

6. That on said 25th day of March, 1913, said J. C. Dodson paid the consideration of \$20,000.00 before

and said Highland Cattle Company then and there had notice of the contents of said writing at the time it was signed by said Day & Foster and delivered to said J. C. Dodson.

7. That said draft was forwarded and presented in due course to said Highland Cattle Company, and on or about the 31st day of March, 1913, by it honored and paid.

8. By reason of the foregoing the Highland Cattle Company has ratified the said contract; and the said Highland Cattle Company is now and forever barred and estopped from questioning or repudiating the same.

9. That on or about the 20th day of June, 1913, said Day and Foster were ready, willing and able to convey good title to said ranches, cattle and livestock, and other personal property agreed by them to be conveyed in said contract, and on said date last mentioned they made tender of such conveyances to said Highland Cattle Company, and have ever since kept such tender good.

10. That said Day & Foster have performed all and singular the conditions and covenants in said agreement by them to be performed, but said Highland Cattle Company has failed and refused to perform the covenants by it to be performed.

Wherefore, this defendant prays that he may go hence without day, with his costs in this behalf most wrongfully incurred.

J. H. MERRIAM,
JOSEPH L. LEWINSOHN,
HUNSAKER & BRITT,

Attorneys for Defendant Day.

United States of America, State of California, County of Los Angeles—ss.

H. C. Day, being first duly sworn, deposes and says: That I am the defendant named in the foregoing separate answer; that I have read said answer and know the contents thereof, and that the same is true of my own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters, I believe it to be true.

H. C. DAY.

Subscribed and sworn to before me this 28 day of December, 1915.

(Seal) D. M. HUNSAKER,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. 299 Civil. In the United States District Court, Southern District of California, Southern Division, Ninth Circuit. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.*, defendants. Answer of defendant H. C. Day. Receipt of a copy of the within is hereby admitted this 28th day of December, 1915. Wm. M. Sims & Madison Marine, attorneys for plaintiff. Filed Dec. 28, 1915. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Joseph L. Lewinsohn. Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring streets, Los Angeles, Cal., attorneys for deft. Day.

Civil No. 299.

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

H. F. DANGBERG LAND & LIVESTOCK COM-
PANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing
business under the firm name and style of
DAY & FOSTER,

Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial before the above-entitled court without a jury (trial by jury having been duly waived by written stipulation entered into between the parties and filed with the clerk of the court prior to the commencement of the trial), on the 20th day of June, 1916, and proceeded from day to day until the trial was completed on the 27th day of June, 1916; and the plaintiff was represented by its attorneys, Wm. M. Sims, Esq., and Olin Wellborn, Jr., Esq., and the defendant H. C. Day by his attorneys, J. H. Merriam, Esq., and Hunsaker & Britt and LeRoy M. Edwards; the defendant S. A. Foster not having been served and not having appeared in the action; and the evidence on behalf of plaintiff, in support of its amended complaint, and on behalf of the defendant H. C. Day, in support of his answer, having been adduced, and the cause having been argued and submitted to the court, the court being fully advised

in the premises, now makes the following findings of fact, to-wit:

1. The allegations of the first, second, third, fourth and fifth paragraphs of the amended complaint are true.

2. During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the states of New Mexico and Arizona. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was the vice-president of the said Highland Cattle Company, also a director and large stockholder therein, and was resident agent of said Highland Cattle Company in the state of New Mexico, and was manager of its business in the said states of New Mexico and Arizona; and during all the aforesaid times was acting as the manager of all its business in the states of New Mexico and Arizona.

3. The court finds that on or about the 25th day of March, 1913, the Highland Cattle Company, a corporation, by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day & Foster, which said contract was and is in words and figures as follows:

“This agreement, made this twenty-fifth day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster, of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent for said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland

Cattle Company of Minden, Nevada, party of the second part,

Witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 (\$20,000.00) dollars lawful money of the United States in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, *ect.*, mentioned in the deed hereto attached, and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand and 00/100 (\$230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrance of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

Said party of the first part covenants and agrees

to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER.

S. A. Foster.

J. C. DODSON,

Manage. Highland Cattle Co.

State of Arizona, County of Greenlee—ss.

Before me, B. R. Lanneau, a notary public, in and for the county of Greenlee, state of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.)

(Notarial Seal)

B. R. LANNEAU,

Notary Public.”

4. The court finds that it is untrue that S. A. Foster, or H. C. Day, at any time stated or admitted to the Highland Cattle Company, or any of its officers or representatives, that any contract, other than the contract heretofore set forth, had ever been executed by said Day & Foster with J. C. Dodson; and the court finds that the said contract heretofore set forth was

the only contract entered into between said parties; and the court further finds that it is untrue that the said Day & Foster ever executed the document set forth in paragraph VIII of plaintiff's amended complaint, and that it is untrue that S. A. Foster ever stated or admitted to the president or secretary of Highland Cattle Company, or any other person, that said document set forth in paragraph VIII of plaintiff's amended complaint had ever been executed by said Day & Foster.

5. The court finds that each and all of the allegations set forth in paragraph numbered XIII of plaintiff's amended complaint are untrue.

6. The court finds that each and all of the allegations set forth in paragraph numbered XIV of plaintiff's amended complaint are untrue; and the court finds that the said J. C. Dodson, at the time he entered into said contract of March 25, 1913, did have authority to enter into same for and on behalf of the said Highland Cattle Company.

7. The court finds that Day & Foster were ready, willing and able, at all times, to perform all of the terms and conditions upon their part under the said contract of March 25, 1913; and the court finds that the Highland Cattle Company, on or about the 26th day of May, 1913, repudiated the said contract and refused, without cause, to further comply with the same or to pay the balance of the purchase price set forth therein, and that the said Highland Cattle Company has at all times since failed, refused and neglected to carry out said contract upon its part.

8. The court finds that the Highland Cattle Com-

pany paid to Day & Foster \$20,000.00, as a part payment under and according to the terms of the aforesaid contract of March 25, 1913, and that said payment was not made by the Highland Cattle Company to the said Day & Foster by reason of any mistake upon the part of the said Highland Cattle Company concerning said contract or its terms.

9. The court further finds that the said contract of March 25, 1913, was entered into by said Day & Foster without any knowledge upon their part that the said J. C. Dodson intended to perpetrate any fraud upon the Highland Cattle Company by entering into said contract; and the court further finds that neither Day nor Foster at any time prior to May 26, 1913, knew that the said J. C. Dodson had made any false statements or representations to any officers of the Highland Cattle Company, respecting said contract or any fact or circumstance connected therewith.

10. The court finds that neither the sum of \$20,000.00 nor any other sum is due or owing or unpaid from the said co-partnership of Day & Foster or from the defendant H. C. Day to the plaintiff.

As conclusions of law from the foregoing findings the court concludes:

1. That the plaintiff is not entitled to recover the amount of money prayed for in its amended complaint, or any sum, from the defendant H. C. Day, and that it take nothing against said defendant H. C. Day.

2. That the defendant H. C. Day is entitled to recover his costs against the plaintiff, herein incurred.

Let judgment be entered accordingly.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: Original. Civ. No. 299. In the United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.*, etc., defendants. Findings of Fact and Conclusions of Law. Filed Sept. 19, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk. J. H. Merriam and Hunsaker & Britt and Le Roy M. Edwards, 1132-1143 Title Insurance Bldg., Fifth and Spring streets, Los Angeles, Cal., attorneys for deft. Day.

Civil No. 299.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY & FOSTER,

Defendants.

Judgment.

This cause came on regularly for trial before the above entitled court, a jury having been duly waived by written stipulation entered into between the parties to the above entitled action and filed with the court prior to the commencement of the action, on the 20th day of June, 1916; and the plaintiff was rep-

resented by its attorneys, Wm. M. Sims, Esq., and Olin Wellborn, Jr., Esq., and the defendant H. C. Day by his attorneys, J. H. Merriam, Esq., and Hunsaker & Britt and LeRoy M. Edwards; and the defendant S. A. Foster not having been served, and not having appeared in the action, and the evidence on behalf of the plaintiff having been introduced in support of the allegations of its amended complaint, and on behalf of the defendant H. C. Day in support of his answer having been adduced, and the court having made and filed its findings of fact and conclusions of law and ordered judgment accordingly:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court and so ordered that the plaintiff is not entitled to recover against the defendant H. C. Day in the amount prayed for in its amended complaint or any sum whatever;

And it is considered by the court and so ordered that the defendant H. C. Day have and recover against the plaintiff his costs herein incurred taxed and allowed in the sum of \$154.00.

Dated Sept. 19, 1916.

OSCAR A. TRIPPET,
Judge.

Judgment entered September 19, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk.

[Endorsed]: Original. Civ. No. 299. In the United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.*, etc., defendants. Judgment. Filed Sep. 19, 1916. Wm. M. Van

Dyke, clerk; by Leslie S. Colyer, deputy. J. H. Merriam and, 1132-1143 Title Insurance Bldg., Fifth and Spring streets, Los Angeles, Cal., attorneys for deft. Day.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day *et al.*, defendants. No. 299 Civil.

I, Wm. M. Van Dyke, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the judgment made and entered in the above entitled action, and recorded in Judgment Register No. 2 of said court for the Southern Division, at page 374 thereof; and I do further certify that the foregoing papers hereto annexed, constitute the judgment roll in said action.

Attest my hand and the seal of said District Court, this 22nd day of September, A. D., 1916.

(Seal)

WM. M. VAN DYKE,

Clerk.

By LESLIE S. COLYER,

Deputy Clerk.

[Endorsed]: No. 299 Civ. In the District Court of the United States for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Co. vs. H. C. Day *et al.* Judgment Roll. Filed Sept. 22, 1916. Wm. M. Van Dyke, clerk; by Leslie S. Colyer, deputy clerk. Recorded Judg. Reg. Book No. 2, page 374.

Civil No. 299.

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

H. F. DANGBERG LAND & LIVESTOCK COM-
PANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing
business under the firm name and style of DAY
& FOSTER,

Defendants.

Amended Bill of Exceptions.

This cause came on regularly for trial in the above entitled court without a jury (a trial by jury having been duly waived by written stipulation between the parties, and fixed with the clerk of the court), on the 20th day of June, 1916. and proceeded from day to day until the trial was completed on the 27th day of June, 1916, Wm. M. Sims, Esq., and Olin Wellborn, Jr., Esq., appearing as attorneys for the plaintiff, and Messrs. Hunsaker and Britt, LeRoy M. Edwards, Esq., and J. H. Merriam, Esq., appearing as attorneys for the defendants; the cause having been submitted to the court, the court thereupon rendered its findings in writing which are on file herein, among which are the following:

XX "2. During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the state of New Mexico and in

Arizona. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson, was the vice-president of the said Highland Cattle Company, also a director and large stockholder therein, and was resident agent of said Highland Cattle Company in the state of New Mexico, and was manager of its business in the said states of New Mexico and Arizona, and during all of the aforesaid times was acting as the manager of all its business in the states of New Mexico and Arizona.

“3. The court finds that on or about the 25th day of March, 1913, the Highlands Cattle Company, a corporation, by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day and Foster, which said contract was and is in the words and figures as follows:

“This agreement, made this twenty-fifth day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, party of the second part.

Witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 (\$20,000.00) dollars lawful money of the United States in hand paid to the party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part hereby grant, bargain, sell and convey unto the said

party of the second part, all cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand 00/100 (\$230,00.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrance of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

Said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER.

S. A. Foster.

J. C. DODSON,

Manager Highland Cattle Co.

State of Arizona, County of Greenlee—ss.

Before me, B. R. Lanneau, a notary public, in and for the county of Greenlee, state of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster, and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.

B. R. LANNEAU,
Notary Public."

XX "6. The court finds that each and all of the allegations set forth in paragraph numbered XIV of plaintiff's amended complaint are untrue; and the court finds that the said J. C. Dodson, at the time he entered into said contract of March 25, 1913, did have the authority to enter into same for and on behalf of the said Highland Cattle Company."

XX "8. The court finds that the Highland Cattle Company paid to said Day and Foster \$20,000.00, as a part payment under and according to the terms of the aforesaid contract of March 25, 1913, and that said payment was not made by the Highland Cattle Company to the said Day and Foster by reason of any mistake upon the part of the said Highland Cattle Company, concerning said contract or its terms.

XX "10. The court finds that neither the sum of

\$20,000.00, nor any other sum is due or owing or unpaid from the defendant, H. C. Day to the plaintiff.

Plaintiff excepts to all of the findings above quoted, and to each and every one thereof, on the ground that there is no evidence to support such findings, or any one or more of them.

The following is the evidence and all of the evidence introduced at the trial of said cause which related to the matters embraced in said findings.

H. F. DANGBERG, a witness called on behalf of the plaintiff, being first duly sworn, testified on

Direct Examination

as follows:

I reside in Minden, Nevada, and am engaged in the business of general farming and livestock. I am now, and since the month of May, 1913, was the secretary and treasurer of the Highland Cattle Company. I first saw the document headed "Agreement" and set forth in paragraph seven of plaintiff's complaint, on the 30th day of March, 1913, at the Overland Hotel, at Reno, Nevada, in the presence of Dodson and Humphrey. Mr. Dodson stated that the document was a carbon copy of an original that was in the Bank of Duncan, Duncan, Arizona, and that it purported to be a trade and option that he had taken with the Foster and Day people on the "Lazy Bee" outfit. (The following is a copy of said agreement marked "Plaintiff's Exhibit 3:)

(Testimony of H. F. Dangberg.)

“AGREEMENT.

This agreement made this 25th day of March, in the year of our Lord one thousand nine hundred and thirteen between Day & Foster, of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of Day and Foster, party of the first part, and J. C. Dodson, Manager of the Highland Cattle Company, of Minden, Nevada, party of the second part, witnesseth:

That for and in consideration of the sum of twenty thousand (\$20,000.00) dollars, lawful money of the United States, in hand paid to the said party of the first part, receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto said party of the second part, all cattle, horses, real estate and farming implements mentioned in the deed hereto attached, and the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand (\$230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the 20th day of June, 1913.

The said party of the first part guarantees there to be nine thousand (9,000) head of cattle, calves from October, 1912, not to be counted. The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned, and said

(Testimony of H. F. Dangberg.)

party of the first part guarantees that all property mentioned in said papers is free from all incumbrances whatsoever kind and that they have a good and perfect title to the same. The deed hereto attached covers one thousand (1,000) acres of land, more or less. The bill of sale hereto attached covers nine thousand (9,000) head of cattle and ninety head of horses. The said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof the said parties to this agreement have hereunto set their hands and seals March 25, 1913.

.....
.....
.....

The defendants moved that the above testimony relating to Dodson's conversation with the witness concerning said agreement be stricken out, as *heresy*, incompetent, irrelevant and immaterial and not said in the presence of the defendants and was a gratuitous statement of the plaintiff's own agent, whereupon the court sustained the motion, to which ruling of the court plaintiff duly excepted.

Plaintiffs then offered to prove by this witness that Dodson in the presence of Mr. Humphreys and this witness, handed them the contract that is in evidence (Plaintiff's Exhibit 3), and stated to them at that time, that the original of this contract, which he and defendant Foster had signed, was placed in escrow in

(Testimony of H. F. Dangberg.)

the Duncan Bank, and that there were to be bills of sales and other papers also deposited in the bank.

The court refused the offer and stated that any such testimony as offered had been ruled out.

On the 30th day of March, 1913, when I returned to my office in Minden, Nevada, I received by mail a draft for twenty thousand dollars (\$20,000.00) in favor of Day and Foster on the Highland Cattle Company, also a receipt bearing the same date, signed by Day and Foster. The following is a photographic copy of said receipt, which is now in the same condition as it was when received by me:

(Here insert photographic copy of said receipt and indicate thereon the different colored inks.)

Highland Cattle Co.
 MINDEN, NEV.

70
 112

Mason

Bought of *Day & Foster*

THE FOLLOWING

NO. HEAD	LIVE STOCK	WEIGHT	PRICE	AMOUNT
<p><i>all their cattle from the</i> <i>Arizona & N.M. part of this check</i> <i>there is to be 9,000 cattle above October 1st</i> <i>at 100 lbs. is more than land will support</i></p>				

Above Live Stock to be delivered F. O. B. cars
 edge receipt of \$*20,000*

191 *and*

J. C. Johnson
 BUYER

Day & Foster

Photo of car for index
 ①
Dayley Pitts
Day et al
Deft
Flint

(Testimony of H. F. Dangberg.)

And the following is a copy of said draft:

“Highland Cattle Company. 8048 No. 112.
March 25, 1913.

Pay to the order of Day and Foster . . . \$20,000.00
twenty thousandno-100 dollars.

J. C. DODSON,
Buyer.

Dealers and growers of livestock, Minden, Nevada.
Farmers Bank of Carson Valley, Inc. Paid Mar. 31,
1913. Minden Nevada.”

Endorsed: Day and Foster. Pay to the order of
any bank or bankers all prior endorsements guaran-
teed. The Bank of Duncan, 91-64 Duncan, Ariz.
91-64. B. R. Lanneau, cashier. For collection. Pay
to the order of any bank or banker. Mar. 28, 1913.
The Crocker National Bank of San Francisco.”

I glanced over the advice and saw that the amounts
were comparable and thereupon took up the draft of
twenty thousand dollars (\$20,000.00).

I first saw the contract which was placed in escrow
in the Bank of Duncan, Duncan, Arizona, about May
26, 1913, Mr. Foster, the cashier of the bank, Mr.
Nichols and myself were present at the time. After
reading the contract over we stated that we repudiated
the contract and demanded the money back. I said
to Foster we will take the cattle at \$27.00 a head,
October calves thrown in, the ranches and lands to go
with the trade, and Foster returned the contract and
said he would not do anything of that kind, or words

(Testimony of H. F. Dangberg.)

to that effect. We talked over the advice on which we paid the \$20,000.00. Mr. Foster stated he signed the advice but that it had been changed since he signed it.

At that time Foster said he thought they had around seven thousand head of cattle, that they didn't have nine thousand, possibly less than seven thousand."

Dodson occupied the position of ranch manager for the Highland Cattle Company. There was no contract as to Dodson's employment with the Highland Cattle Company. His duties were to look after the cattle and mills and general superintendency of the Highland Cattle Company.

Mr. Humphrey and myself met Dodson at Lordsburg, about the middle of February, 1913. I believe at that time we talked over with him about looking up other cattle deals and reporting to us, and seeing if we could get any options, and reporting to us. We talked over the "Lazy Bee" deal with him and directed him to see what kind of an option we could get on it on the basis of so much a head. Mr. Humphrey and myself, as president and secretary of the Highland Cattle Company, told him to go ahead. He told us he could get the "Lazy Bee" matter settled for \$27.00 per head, October calves thrown in, and the lands and other holdings of the company to go in with the trade. I told him if he could buy the outfit on that basis to go and get an option and get the option extended so we could get back to Nevada and arrange our finances to take over the deal

(Testimony of H. F. Dangberg.)

on the basis as he had reported it to us, telling him also to arrange the payments as small as he could, giving us time and opportunity to fix our finances in regard to handling this deal; that was about the extent of our conversaiton.

About the 13th day of March, 1913, Dodson and myself went to Santa Fe. We discussed the "Lazy Bee" matter and he presented the thing to me in the same way, and stated he thought he could buy an option upon the Lazy Bee" on the basis of \$27.00 per head, October calves thrown in, and the rest of the holdings to go in and he thought he could get a reasonably small payment down and we could finance it and put it over. I told him if he could make the deal on that basis, I could get the boys in Nevada to stand behind the deal, and we could finance it and put it over. I, as secretary of the company, gave him no other authority than just stated in the two conversations mentioned.

Q. By Mr. Sims: This is the minute-book of the Highland Cattle Company, is it not?

A. It is.

Q. Have you examined it, and do you know the contents?

A. I do.

Q. Is there any written authority of any kind or manner authorizing Mr. Dodson to purchase the "Lazy B" cattle?

A. There is not.

I received a letter from Dodson, dated February 26, 1913, a few days after it was written, as follows:

(Testimony of H. F. Dangberg.)

“February 26, 1913. H. F. Danberg. Friend Fred: I saw Foster can trade with Lazy “B” something like the lines Frank talked of. Can sell anything and he will collect his money as they are turned over he thought might make a loan of \$75,000 on the property for one year was sure could have \$50,000 for one year—Prices are as I gave them to you. When I get pressing him I find he has—7 sections leased out where we were. has 3 sections bought five with absolute lease—making 15 sections controlled beside the other deeded land he has—I can get 15 days time to finish deal with I think I can contract enough to meet first payment the second payment to be made by June 1st unless there would be some sales made and deliveries beforehand—

If James don't want to come in arrange with Frank so we can buy this and less sell down so we will get control of the range—he is getting a 3 ct. an acre lease—I certainly can get the same I will try awfully hard at any rate.

I am going to Los Cruses today and see what I can do I might go on to Santafe if think can do any good by so doing. I am enclosing you two vouchers—one \$150.00 for my personal expense. One for \$500.00 for Henry—as you will see by them let me know as soon as possible what to do about the Lazy B will let you know the result of my Los Crusas trip I didn't see the Big Buy on this trip am strictly decent.

Resp. yours,

J. C. DODSON.

(Testimony of H. F. Dangberg.)

Scott and bunch still here I don't think they will ever leave."

Cross-Examination

By Mr. Edwards:

Q. Did I understand you to say that Mr. Dodson bore or sustained no other relation towards the Highland Cattle Company, except that as superintendent of the ranch?

A. That was the only relation he sustained.

Q. Wasn't he the vice-president of the company?

A. Yes, he was vice-president.

Q. Wasn't he a director of the company?

A. He was a director.

Q. Was he elected general manager of the company?

A. He was not.

Q. Under your minutes of your initial meeting of the Highland Cattle Company, was he not elected to fill a position created under the by-law as general manager and superintendent?

Q. He was appointed resident agent for the corporation in New Mexico, was he not?

A. He was.

Q. And do you say he was not the general manager of the company?

A. He was not general manager.

Q. Do you remember testifying before the grand jury in New Mexico in September, 1913?

A. I do.

Q. I will ask you if you did not at that time state as follows (reading): "Q. You had best state the

(Testimony of H. F. Dangberg.)

relation of James C. Dodson to you and that company.

A. At any time during the transaction that occurred Mr. Dodson was supposed to be a director of the Highland Cattle Company and came here as ranch manager for the company; he was to attend to the ranch affairs and pay the expenses of the ranch, look up deals and transactions for the company, present these deals and transactions to the board of directors and myself, as managing director for our corporation." Is that true?

A. I may have made that statement.

Q. It is true, is it not?

A. He was ranch manager, yes; that is true.

Q. Your by-laws provide for the election of a general superintendent and manager of the corporation, do they not?

A. Yes.

Q. And who was elected to fill that position at that time during the month of March, 1913?

A. To my recollection there was no one selected; that was passed over.

Q. I will ask you if at this same hearing if you were not asked the following questions at that time and place? (Reading): "Q. Was he at that time"—this is speaking of the 30th day of March, 1913—

"Was he at that time an employe of the company?"

A. Yes. Q. Did they make him that superintendent? A. Yes; he had been made manager of the company."

A. I don't remember having made that statement.

Q. (Continuing reading): "Q. When was he

(Testimony of H. F. Dangberg.)

made manager? A. When the company was incorporated. "When was the company incorporated? A. About the 13th day of January, 1913."

Q. By the Court: Did you so testify at the time and place specified?

A. I don't remember having made exactly that statement.

Q. What was your testimony on the subject?

A. My testimony at all the time was that he was ranch foreman—ranch manager.

Q. By Mr. Edwards: You will swear then that you did not testify as I have read to you at that time?

A. No, I will not—

Q. But you won't swear that you did testify to that?

A. I won't swear that I didn't testify to that, but I don't remember the testimony.

Q. By the Court: Sir?

A. I don't remember the exact testimony given at that time.

Q. Well, if what he has read there is the truth, you testified to it, didn't you? If it is not the truth, you didn't. What did you do about it?

A. Well, I don't remember, but I don't think I testified that way, that he was general manager; I testified that he was ranch manager. If I did testify that he was general manager, I was wrong in my testimony.

Q. By Mr. Edwards: Your memory is no fresher now than it was then as to the facts?

A. No.

(Testimony of H. F. Dangberg.)

Q. I will ask you if you testified before the *habeas corpus* proceedings of Dodson down in New Mexico in 1913?

A. I believe I did.

Q. I will ask you if at that time you did not testify as follows (reading): "Q. For whom was Mr. Dodson acting in making this transaction? A. In behalf of the Highland Cattle Company, a managerial position and a shareholder of the company, representing the company here and doing business which would have to be subsequently ratified."

A. I believe I testified to that.

Q. That is true, is it not?

A. It is true.

Q. That he was representing the company there?

A. In a managerial position.

Q. I will ask you if you did not testify as follows at that time? "Q. He was sent down there to conduct the business of this corporation in this region?

A. He was. Q. And that business was to be the buying and selling of cattle? "Yes." Did you so testify at that time?

A. I might have testified to that.

Q. Is it true?

A. No, it is not true.

Q. It is not true?

A. Please repeat that question.

Q. (Reading): "He was sent down there to conduct the business of this corporation in this region?

A. He was. Q. And that business was to be the buying and selling of cattle? A. Yes."

(Testimony of H. F. Dangberg.)

A. I don't remember that I made that exact answer; if I did, I was wrong.

Q. You were wrong?

The Court: When was that testimony given?

Mr. Edwards: Before the *habeas corpus* proceedings.

The Court: What is the date of it? Where?

Mr. Edwards: State of New Mexico. I will give the exact date.

The Court: You want to state the time, place and circumstances.

Mr. Edwards: We have got it here. I had it in my office.

Q. By the Court: Do you remember when that *habeas corpus* proceedings took place?

A. I do not exactly, Judge.

Mr. Edwards: We have the transcript of proceedings here somewhere.

Q. By the Court: About when?

A. I think it was sometime in May.

Mr. Merriam: I think it was about the fore part of June, 1913.

Q. By the Court: Where?

A. At Silver City.

Q. At New Mexico?

A. New Mexico.

Q. Sir?

A. New Mexico.

The Court: That is all, Mr. Edwards. Proceed with the case.

Mr. Edwards: We will produce them. It seems

(Testimony of H. F. Dangberg.)

they were not bought here. We have those complete transcripts.

The Court: Well, he has testified definitely enough about that, I suppose.

Mr. Edwards: We have a certified copy of the proceedings. It is dated the 13th of June, 1913.

Q. That is about correct, is it not?

A. That is about correct, as I remember it.

Q. Mr. Dodson was an owner of one-third of all the capital stock of the Highland Cattle Company, was he not, in March, 1913?

A. He was presumed to be.

Q. Well, there was one-third of the capital stock stood in his name, that was true?

A. The certificate was issued but never delivered.

Q. The certificate was issued to him for one-third of the stock?

A. But never delivered to him.

Q. By the Court: Was he a subscriber for it?

A. He was a subscriber for it.

Q. By Mr. Edwards: And his holdings at that time were equal to the holdings you had subscribed for?

A. Supposed to be.

Q. Well, they were, were they not, equal?

A. They were supposed to be at that time, yes.

Q. Well, you have seen your articles of incorporation that you have introduced in evidence here?

A. Yes.

Q. You acknowledged those to be correct, did you not, at the time they were executed?

(Testimony of H. F. Dangberg.)

A. Yes, sir.

Q. I will call your attention to your articles of incorporation, which state as follows (reading): "The business affairs of this corporation shall be conducted by a board of five members who shall be styled directors. The names and residences of those who have been elected for the ensuing year, and who also are subscribers to all of the capital stock of this corporation, which is issued in full and fully paid together with the number of shares subscribed for each are as follows:

Name:

Shares:

J. C. Dodson, Lordsburg, New Mexico, 66,666 shares

Frank E. Humphreys, Reno, Washoe
county, Nevada, 66,666 shares

H. F. Danberg, Minden, Douglas coun-
ty, Nevada, 66,666 shares

J. B. Danberg, 1 share, J. G. Sweeney, Carson City,
Nevada, 1 share." Is that correct?

A. That is correct.

Q. And you acknowledged these articles to be true, did you not?

A. Yes.

Q. And Mr. Dodson had not parted with any of this stock up to the end of March, 1913, had he?

A. No.

Q. The corporation caused to be filed in the state of New Mexico, did it not, before the first of March, 1913, a certificate appointing Dodson as resident agent and manager for your company in that state?

A. It did.

(Testimony of H. F. Dangberg.)

Mr. Wellborn: That is objected to as immaterial and not proper cross-examination.

The Court: I don't think it is proper cross-examination.

Mr. Edwards: I was going into the question of agency.

The Court: Oh, yes. Objection overruled.

Q. By Mr. Edwards: At the time you had a conversation with Mr. Dodson, and which you place about the middle of March, 1913, in the town of Lordsburg—

Mr. Sims: No, the 13th of February.

Mr. Edwards: He mentioned two conversations. The second one was the 13th of March.

The Witness: That was on the road to Santa Fe.

Q. By Mr. Edwards: You stated at that time that you told him that if he could get an option, is that correct?

A. Yes.

Q. Did you use the word "option."

A. I always talked with him in options, yes.

Q. Do you recall testifying a *habeas corpus* proceeding in June 13th, 1913.

The Court: He said he did, Mr. Edwards.

Q. By Mr. Edwards: And you remember testifying in the criminal trial of Dodson a little later than that in New Mexico, in March, 1913?

A. Yes.

Q. Do you remember whether there at either of those two trials you ever mentioned the word "option"

(Testimony of H. F. Dangberg.)

in regard to your conversation with Dodson?

A. I don't remember.

Q. Are you willing to state that you have ever testified at any time prior to this that you spoke to him about getting an option?

A. Not as to my former testimony, I am not positive.

Q. I will ask you if, at the time you testified before the grand jury in New Mexico, in September, 1913, you did not testify as follows: "We have here the case whereby he obtained \$20,000, the Foster and Day case. I was down here in person looking over the affairs of the company in Lordsburg in March—around March 13th. Mr. Dodson represented to me that he could buy the "Lazy B" outfit, nine thousand head of cattle, all the horses and everything for \$250,000, and I told him that I would take the matter up with the president, Mr. Humphrey, and I thought we could make the deal on that basis and could raise the money and go through with it. After talking it over we authorized him to go ahead and make the deal on his representations."

Q. By the Court: Did you so testify before the grand jury?

A. I don't remember as to that testimony, but if it is there, I undoubtedly did.

Q. By Mr. Edwards: You won't swear that you did not?

A. I won't swear that I did not.

Q. Is that true?

A. Not as to the full conversation, no.

(Testimony of H. F. Dangberg.)

Q. What did you testify was true or untrue?

A. In part true, but it did not go on fully with the deal as explained.

Q. Well, is that part true, that you authorized him to go ahead and make the deal?

A. We authorized him to go ahead and get an option.

Q. And get an option?

A. Yes.

Q. And you didn't say that at that time, did you?

A. That is the words I used at that time with Dodson; whether I stated that on that evidence, I don't know.

Q. Did Dodson speak to you about buying the "Lazy B" outright for a lump sum rather than so much a head for the cattle?

A. He talked of it in that way, explaining to me that it was on the basis of \$27 per head, that the deal was \$250,000, but that the cattle—anything less than the nine thousand head of cattle would count off the lump sum of \$250,000, on that basis of \$27 a head, making the ranches and the holdings \$7000 secured in; that is as I explained the deal.

Q. You mean buy all their ranches for \$7000?

A. That was the explanation.

Q. Do you know the extent of their ranches? Did you inquire?

A. I didn't know how extensive they were.

Q. Didn't you know there was over a thousand acres?

A. Yes, I knew there was over a thousand acres.

(Testimony of H. F. Dangberg.)

Q. And you expected to buy those for \$7 an acre?

A. That is what I expected to pay then if we bought them on that trade.

Q. You had gone over the property yourself, had you not, in March, 1913?

A. I don't believe prior to this time.

Q. Didn't you go over the ranch—the Day and Foster ranch, or part of it, in 1913?

A. I did go over it sometime in 1913; I forget the exact date.

Q. In an automobile driven by a man named Owendy?

A. Yes.

Q. Examine the ranch itself?

A. Yes.

Q. How many times did you go over it?

A. Went over it just once, partially; just one time.

Q. What was your relationship to the Highland Cattle Company?

A. Secretary-treasurer.

Q. Were you not managing director?

A. I have never had any authority as managing director.

Q. I will call your attention to this part of your testimony before the grand jury in 1913, in New Mexico, and ask you if you did not testify as follows, speaking of Dodson: “He was to attend to ranch affairs and pay the expenses of the ranch and look up deals and transactions for the company and present these deals and transactions to the board of

(Testimony of H. F. Dangberg.)

directors or to myself as managing director for our consideration.”

A. If I made that statement, I was mistaken.

Q. That was not true? You say that Mr. Dodson had to submit everything to you or Mr. Humphreys before you would pass upon it?

A. Yes, sir.

Q. You left none of these matters to his own discretion?

A. None whatever.

Q. Buying and selling of cattle?

A. None whatever.

Q. I am going to show you a letter, Mr. Dangberg, and ask you if that is your signature and if you wrote that letter on or about the date it bears?

A. I did.

Q. To Mr. Dodson?

A. To Mr. Dodson.

Mr. Edwards: I will read this letter and offer it in evidence as Defendant's Exhibit (reading):

“Feb. 1st, 1913.

Mr. J. C. Dodson,

Lordsburg, New Mexico.

Friend Dodson:

Frank came up this morning and we have all been together and have had a good, dignified meeting of the Highland Cattle Company. Read your several letters, and bought a drink on the strength of same. That it was the sense of said meeting that if you could get any such a price as \$40.00 for cows, \$30.00

(Testimony of H. F. Dangberg.)

for yearling steers, or \$25.00 for yearling heifers, that you bust ahead. We will be perfectly satisfied with whatever you may do in the premises, but we kind of feel as though selling the old cows would be better than to sell the yearling heifers, at least best to hold on to the best of said yearling heifers at any rate, but being on the ground, of course you will know best, and also that if you can't get just the top figure, your judgment will be acceptable at any and all times.

We are getting our saddles oiled up, getting some leather chaps, getting some double cinches made, and you may look for any time after the 10th of the month and we will wire you a day or two before we leave San Francisco.

Also that we are arranging for fifty in Reno, which you will understand, and will be able to go that far anyway, if not further.

And now, with best wishes to you for all here, we are,

Yours very truly,

H. F. DANBERG,

Sec'y.

HFD-M

P. S. We are sending under separate cover one hundred of the drafts with a cover for same. Also, if my grip is at Lordsburg, hold it there and I will get it at that point. The draft and telegram have just arrived, and have taken up draft, and everything alright."

(Testimony of H. F. Dangberg.)

We offer that in evidence.

Mr. Wellborn: Objected to as immaterial.

The Court: I think it has a material bearing on his agency and powers. Overruled. What is the date of it?

Mr. Edwards: February 1st, 1913.

The Clerk: Defendant's Exhibit "A."

Q. By Mr. Edwards: Do you know what the prevailing price was of ranch cattle around about Duncan in March, 1913?

A. About \$27 or \$28 a head.

Q. It was not \$30, was it?

A. Not living there and not trading there, I could not state positively. I thought it was about \$27 or \$28 a head.

Q. I will show you a letter—this does not pertain to this last question—dated February 4, 1913, signed H. F. Danberg, and ask you if you wrote that letter on or about the date it bears?

A. Yes, sir.

Mr. Edwards: We will read this and later offer it in evidence (reading):

"Minden, Nevada, Feb. 4th, 1913.

Mr. J. C. Dodson,

Lordsburg, N. M.

Friend Dodson:

Your letter of February 1st just to hand, and note that things are getting pretty lively with you, and am truly hopeful that you will have things lined up for the Lazy B by the time Frank and I reach there.

(Testimony of H. F. Dangberg.)

Now have your telegram, and also note in your letter that you want us to wait until Cattlemens Convention, but Frank and I have arranged our other matters here, and making it possible for us to leave here about the 14th, stopping in the City to see James for a day or so, and leaving Lordsburg somewhere about the 20th of the month, having to be home shortly after the first of March, as we both have matters to demand us here, so trust you can pull that Cattlemens Convention off to your liking, as we would like to attend some while there.

I am having a sample chute made, or rather a model of a chute, and will send it to you in a few days, as it might help you in building the new one.

The writer notes the prices you have been offered, and it certainly looks good and if you don't get the other price, the offer will be good anyway, although every one will be pleased of course, if you hit the top notch.

While in the city seeing James, we will have other connections, providing James does not come in, and also note your propositions on the state land, which certainly looks good for big protection to the range.

That telegram that you sent on the 25th arrived alright, stating to protect draft, but what I was trying to impress was that you should state the amount; also follow up with written form as soon as possible, so we could at all times be protected from what some outsider might want to put over on us.

If you write immediately on receipt of this letter,

(Testimony of H. F. Dangberg.)

will possibly get same before I leave, otherwise a wire will reach me up till noon on the 12th.

And now, with best wishes to you, and for the success of the enterprise, believe me,

Yours very truly,

HFD—M.

H. F. DANBERG."

Mr. Edwards: We offer that letter in evidence.

The Clerk: Defendant's Exhibit B.

Q. By Mr. Edwards: Did Mr. Dodson make any other deals down there for you on or about this time of the purchase of cattle or ranches?

A. Not for the Highland Cattle Company, I don't believe.

Q. What about the Wilson deal?

A. He made the Wilson deal. That was one of the original deals before it was the Highland Cattle Company—No. That did go into the Highland Cattle Company.

Q. That was made after the Highland Cattle Company was incorporated?

A. Yes, sir.

Q. He made it for you?

A. Yes, sir.

Q. How many head of cattle was that?

A. I forget just what that deal was. There was so many head—it was a bogus contract also.

A. There were several thousand head of cattle, were there not?

A. Yes, sir.

Q. I show you this letter of March 24, 1913, and

(Testimony of H. F. Dangberg.)

ask you if you wrote that on or about the date it bears?

A. Yes.

Mr. Edwards: I will read this letter (reading):

March 24th, 1913.

Mr. J. C. Dodson,
Lordsburg, New Mexico.

Dear Jim:

Frank came up from Reno this morning, and we have been around the ranch looking at fat cattle and eating ham and eggs the balance of the time, and in between spots have been thinking of you and twisting the proposition over in our minds, and of course will be anxious to have your letters that you spoke about in telegram.

We note that there is some soft spot spoken of in the El Paso Times, and which of course makes us feel a little anxious as to what you may do on your contracts, although note you have had a rain thus making it hard to show your buyers the cattle. We are both anxious for the Lazy B deal and hope to hear from you before the week ends regarding same.

We will await a letter from you before going to San Francisco the first of next week, which trip will be taken in the matter of finances, and will depend greatly upon what you may do this week.

We have been wondering whether or not you could close out the Wilson contract on the last two lots as a whole and to our advantage, meaning holding the mills, etc., but of course you have thought of this

(Testimony of H. F. Dangberg.)

yourself undoubtedly, and we know that you will make your deals to our best advantage. At any rate we are going to advise that you sell down as close as possible, even though you had to drop a couple of dollars per head in order to make the deal go through, as from what we have been able to learn at this end, it is going to be a close game for money, as the banks are all tightening up, and you will understand from this explanation what we are anxious to have you do.

Wish you would telegraph on receipt of this, as know you will anyway, as we are anxious to keep in close touch prior to our leaving for San Francisco; also that Frank is figuring to be with you sometime before the first of May.

The weather is very cold here, some snow, and a good warm day in El Paso wouldn't look bad; also that the rain there, while rather inopportune, will certainly insure feed and fat cattle for a later delivery, but "ease up," as that's the dope.

And now, with best wishes from Frank and myself, and that you keep well and be able to hit the iron while she's hot.

Yours very truly,

H. F. DANBERG,

HFD-M

Sec'y.

P. S. Frank says to tell you that we have inquiries for fat cows for May and June, which of course is well for you to know, and what is your opinion as to their condition at that time. Again goodbye."

(Testimony of H. F. Dangberg.)

Q. By Mr. Edwards: I will show you a letter dated January 29, 1913, and ask you if you signed that letter and sent it on or about the date it bears?

A. Yes, sir.

Mr. Edwards: I will read this letter: (Reading)

“Minden, Nevada, Jan. 29th, 1913.

Mr. J. C. Dodson,
Lordsburg, N. M.

Friend Dodson:

We wired you this day to the effect that Silver City Bank had wired us, asking honor on \$10,000.00 draft drawn by you, and that we had received no advice from you. From your letter we expect this draft is alright, but we have had no advice as to the exact amount, so wired the Silver City Bank that we would honor said draft upon finding signature correct, which would give us time to have advice from you, and answer to our telegram to you, which we expect today.

The draft books have just been finished, and Frank is sending same to you tomorrow, and while they will do for the present time, believe that we can get up something better in the hereafter.

I have taken full note of your letter, and things certainly look fine and dandy, and also to tell you that expect Frank here tomorrow or next day, and we will then go to the city as soon as possible after his trip here, and thus to see James, so when we come to Mexico, which will be in a few days or possibly about the middle of next month, trust that will be

(Testimony of H. F. Dangberg.)

prepared with all finances necessary to put over the Lazy B deal.

We are still figuring on handling some of the stuff up at this end, but if prices are as you state, it will make it almost impossible to ship cattle here at a profit, although believe we will figure some way to stock this end up as well.

And now, with best wishes, and trusting to hear from you again with full details of deal, and also to see you, in company with Frank in the near future.

Before closing will ask that when you draw any checks or drafts that are to be paid at this end that you wire if amount be large; also follow up with written instructions immediately, so as to protect this end, thus to make it impossible for an outsider to slip one over on us.

Again with best wishes, I am,

Yours very truly,

HFD:M

H. F. DANBERG."

Q. By Mr. Edwards: I will ask you if you wrote this letter and sent it through the mails on or about the date it bears?

A. Yes, sir.

Mr. Edwards: I will read the letter dated February 9, 1913. (Reading:)

"Minden, Nevada, Feb. 9th, 1913.

Mr. J. C. Dodson,

Lordsburg, N. M.

Friend Dodson:

(Testimony of H. F. Dangberg.)

Have just had talk with Humphreys over the phone and he is leaving for San Francisco tonight. That I am expecting to leave here the night of the 12th, meeting Humphreys in San Francisco the 13th or 14th, staying there one day, and then to Lordsburg, arriving there the fifteenth or sixteenth.

That everything is all fixed at this end and that we will have all finances in shape to handle the contemplated deal. Also that am expecting to hear from you tomorrow or next day before leaving.

With best wishes, I am,

Yours very truly,

HFD-M

H. F. DANBERG."

Q. By Mr. Edwards: I show you a letter that is unsigned, addressed to Dodson February 25, 1913, and ask you if that letter is in your handwriting, and ask you if you sent it on or about the date it bears.

A. That is my handwriting, yes.

Q. You sent that letter on or about that time?

A. Yes, sir.

Mr. Edwards: Letter from Los Angeles, Cal., 2/25/13: "Dear Dodson: Just arrived L. A. & going to stay over day. Frank also here as could not get reservation.

It has been raining all over the state and guess you will make the 31 or 33 for the yearlings as California will be hunting them.

Hope you get a tie up on the B as it all looks good and no country looks so good to the west of us and

(Testimony of H. F. Dangberg.)

we will be anxious to hear from you also that will write you again from San Francisco.

With best wishes to all, I am,

Yours very truly,

Q. By Mr. Edwards: Does that 31 or 33 refer to dollars?

A. Yes.

Q. The price for yearlings?

A. Yes, sir.

Q. I understood you to say a while ago that 27 or 28 was the price of cattle?

A. I made that statement that it was 27 or 28.

Q. You state here 31 or 33.

A. For yearlings.

Q. By Mr. Edwards: I show you a letter dated March 5th, 1913, and ask you if you wrote that letter on or about the date it bears?

A. Yes, sir.

Mr. Edwards: Letter dated March 5, 1913. (Reading.)

“Minden, Nevada, March 5th, 1913.

“Mr. J. C. Dodson, El Paso, Texas.

Friend Jim:

Was with Frank in Carson yesterday talking over the Lazy B matter, asking you the last possible date you had on making the Lazy B deal; also that I thought it best that I should go down again and be with you and thus to assist you in contracts, etc., as I would have to use these contracts to some extent in securing the necessary loan for this extra deal, and

(Testimony of H. F. Dangberg.)

I am expecting telegram from you in answer to mine of yesterday. Also stated in telegram to take at least fifty thousand acres, or sufficient to secure the range, but from reading your letter, note that the Lazy B have taken up much of the territory and that we went over, and all of which we have given consideration, and can see the importance of holding the Lazy B outfit in order to have complete control of the range.

"If secure a favorable reply from you, also it being possible for me to get away, will possibly see you again in a few days, and guess that is hitting the cushions some.

"And now, with very best wishes both from Frank and myself, believe me, Yours very truly, (sgd) H. L. Danberg. HFD-M P:S We are anxious to not take in a fourth party, as believe that we have arranged the financial end of it, providing we can make contracts at that end, so as not to receive any additional assistance."

Mr. Edwards: We offer this in evidence.

The Clerk: Defendant's Exhibit "G."

Q. By Mr. Edwards: You state there "We are anxious to not take in a fourth party." Who were the three already in that you mean by that?

A. Humphreys, Dodson and myself.

Q. And you did not want to take in a third party?

A. Yes.

Q. And you were all equal owners in the deal at that time?

A. Supposed to be.

(Testimony of H. F. Dangberg.)

Q. I will show you a letter dated March 22, 1913, and ask you if you wrote that letter and mailed it on or about the date it bears?

A. Yes, sir.

Mr. Edwards (reading):

“Minden, Nevada, March 22nd, 1913.

“Mr. J. C. Dodson, El Paso, Texas. Dear Jim: Have been expecting telegram from you for past two days, but have concluded that you are busy on deal and thus the reason, and so have wired you this morning, and to the effect that you wire me full particulars, as am figuring on going to San Francisco with Frank Monday or Tuesday.

“Now, I trust to hear from you, and to the effect that you have made the Lazy B deal along the lines that we had talked over. Also that from the conditions surrounding us here, that Frank and myself advice is to sell down as close as possible. Sell at least a couple of thousand more than we had figured on, providing you make the B deal, so that we will be absolutely in the clear at all times.

“The weather very cold and stormy, and note that Texas has had a storm also, and hope that it had no bad influence on conditions there.

“And now, trusting to hear from you by telegram and also letter with full details therein, believe me, Yours very truly, (sgd) H. F. Danberg—H.F.D-M.”

Q. By Mr. Edwards: You speak of selling providing he made the Lazy B deal. You mean he was negotiating the contract to sell the cattle which you

(Testimony of H. F. Dangberg.)

were contemplating buying from the Lazy B people, and you told him to sell those providing he bought the Lazy B cattle. Is that correct?

A. Yes, sir.

Q. By Mr. Edwards: I show you a letter of April 21st, 1913, and ask you if you wrote that letter on or about the date it bears?

A. I did.

Mr. Edwards (reading): "Minden, Nevada, April 21st, 1913. Mr. J. C. Dodson, Lordsburg, N. M. Dear Jim: I have your letter of April 18th and the enclosure from the State Corporation Commission, and have referred same to Sweeney, as he must have slipped a cog some place in not attending to this special matter, but undoubtedly he will give it his attention and everything will be all right.

I note that you have a chance to buy two thousand cows but as Frank expects to leave here by the 7th of next month, and also after talking with him yesterday, am going to advise that you hold the said trades in abeyance, or take twenty days option with no payments, thus not binding yourself until Frank's arrival, as by that time we will be positive as to our cash reserves and our cash necessities in completing the deal; also that they cannot go much higher and can go lower. Your ideas as to keeping our own ranch stuff and filling it with other stuff is a very good suggestion, but as above set forth, hold it till Frank arrives.

"The draft for the automobile has not arrived as

(Testimony of H. F. Dangberg.)

yet but as before stated will attend to same upon its arrival.”

“Nichols and Litch were up with Frank yesterday, and put up their thirty thousand, thus making some forty thousand dollars cash on hand; also that Frank is carrying twenty thousand and we are carrying twenty thousand additional for Company account, and the other people are ready to dig up an additional twenty thousand, so you see we will have one hundred thousand absolute to make the turn, and Frank has asked that we leave the ten thousand in Company account till we make the deliveries, and after we have made the said deliveries that the company would take over the automobile, and make the division of the ten thousand according to our understanding.

I see that you call the new car a hummer, and it will certainly be some pleasure over and above riding around in that rattly old Ford of dad’s, nevertheless give him my best regards, and tell him to come up to Lake Tahoe this summer.

“Believe that Litch leaves here on the 25th and will be there to do as Harry dictates, which is the understanding, and you will find him good help.

“And now, with best wishes to yourself and wife, believe me, Yours very truly (sgd) H. F. Danberg, HFD-M.”

Mr. Edwards: We offer that letter in evidence.

Mr. Wellborn: Objected to as immaterial and not proper cross-examination.

The Court: The objection is overruled.

(Testimony of H. F. Dangberg.)

The Clerk: Defendant's Exhibit "I."

Q. By Mr. Edwards: Who was the Dad that is referred to?

A. The man that drove the Ford machine.

Q. Owenby?

A. Yes, sir.

Q. He is the man that took you over the Lazy B ranch in 1913?

A. Yes, sir.

Q. The same man?

A. Yes, sir.

Q. I show you a letter April 22, 1913, addressed to Mr. Dodson, and ask you if you wrote that on or about the date it bears?

A. Yes, sir.

Mr. Edwards: (reading.) "Minden, Nevada, April 22nd, 1913. Mr. J. C. Dodson, Lordsburg, N. M. Dear Jim: Your letter with vouchers and monthly statement to hand today, and this is simply to acknowledge receipt of same.

"Also note in the El Paso papers that cattle prices are holding high, especially as the ranch people of Texas are requiring them for their own purposes, and believe that when Frank gets down there that you will make some more deals.

"And now, with best wishes, I am, Yours very truly,
(sgd) H. F. Danberg, HFD-M."

Mr. Edwards: I offer that letter in evidence.

Mr. Wellborn: Objected to as immaterial and not cross-examination.

(Testimony of H. F. Dangberg.)

The Court: Overruled.

The Clerk: Defendant's Exhibit "J."

Q. By Mr. Edwards: I show you a letter dated April 3rd, 1913, and ask you if you wrote that letter and sent it on or about the date it bears?

A. Yes, sir.

Mr. Edwards: (Reading) "Minden, Nevada, April 3rd, 1913. Mr. J. C. Dodson, Lordsburg, N. M. Dear Jim: Your letter received, and the writer will take care of your draft of \$385.00 whenever it may show.

"Note what you say as regards the condition of the cattle, and am somewhat surprised, as had expected them to be doing fine by this time, especially that the grass would naturally be good on account of the rains, but Frank expects to leave here in a few days and to be with you on the situation, and also to talk over the proposed deal, although believe we would make a mistake selling, even at this profit, unless there should be some good reason for so doing, my idea being to sell down to cost, but will abide by the decision of you and Frank. Also that it will be possible for me to be with you later on in the month.

"And now, with best wishes, and trusting to hear from you often as to the situation, believe me, Yours very truly, (Sgd) H. F. Danberg, HFD-M."

Mr. Edwards: We offer that letter in evidence.

The Clerk: Defendant's Exhibit "K."

Q. By Mr. Edwards: I show you a letter dated

(Testimony of H. F. Dangberg.)

March 2nd, 1913, and ask you if you wrote that letter on or about the date it bears?

A. Yes, sir.

Mr. Edwards: (Reading.) "Minden, Nevada, March 2nd, 1913. Mr. J. C. Dodson, El Paso, Texas. Dear Jim: Reached home yesterday, and have just telephoned Frank in Reno, he having arrived this morning. Also that we are to be in Carson together tomorrow to decide on the Lazy B matter. Just sent you a telegram, and which this is to confirm, "Take fifty thousand at least. More if necessary. Your judgment best, depending on B. deal. Frank meeting me Carson tomorrow. Will wire again," and trust that you will use your best judgment in the premises. Also that we will arrange for codes and will try to get three books so that we can do our telegraphing by code, thus to save expense.

"The weather conditions here are splendid, and the grass is almost as green as it is in New Mexico.

"We will look for your monthly statement in a few days so that we can get the books started; also that forgot to mention to you your cancelled check, which should have to put in with the incorporation papers, and which you understand.

"Frank went to see the James Boys, and they have taken over a large tract in California, thus making them impossible, and of which we are glad, as we will either bring in better people, or handle it among ourselves, and I am rather in favor of not cutting it up any more than we have at present, thus being better for us all, if we can arrange for the handling of same.

(Testimony of H. F. Dangberg.)

“And now, with best wishes, and trusting to hear from you often, also with full details as to what you have done at Santa Fe, and that you take plenty of time to make your selection, thus to get no poor land on the payroll. Yours very truly, H. F. Danberg, Sect., *H. C. Co.*.. HFD-M.”

Mr. Edwards: We offer this in evidence.

Q. I will ask you where you state here “I am rather in favor of not cutting it up any more than we have to at present, thus being better for us all.” Whom do you refer to as “us all”?

A. The members of the company at that time.

Q. Dodson, yourself and Humphreys?

A. Yes.

Q. I want to ask you did you have an executive committee appointed by the Highland Cattle Company?

A. I don't believe we did.

Q. I will ask you if the powers of the president of the company as conferred by the by-laws of the Highland Cattle Company were as follows: “The president shall be the chief executive officer and head of the company, and in the recess of the board of directors and of the executive committee shall have general control and management of its business and affairs. He shall with the secretary sign all certificates of stock.” That is correct?

A. I believe that is the wording.

Q. And the duties of the vice-president shall be “The vice-president shall be vested with all the powers

(Testimony of H. F. Dangberg.)

and shall perform all the duties of the president in his absence.”

A. That is correct.

Q. The powers of the secretary are “The secretary shall be *ex-officio* clerk of the board of directors and of the standing committees. He shall attend all sessions of the board and shall record all votes and the minutes of all proceedings in a book to be kept for that purpose.”

A. Yes, sir.

Q. When did Mr. Dodson cease to be vice-president and director of the Highland Cattle Company?

A. Sometime in May, right after our investigation when we found out that it was a crooked transaction. He resigned at that time.

Q. I will show you a telegram dated 3/26/13 and ask you if you received that telegram on or about the date it bears?

A. Yes, sir; that is correct.

Mr. Edwards: Telegram dated Lordsburg, New Mexico, 3/26. “H. F. Danberg, Minden. Closed deal with Lazy B. paid check twenty thousand made contract for sale of cows and steers subject to your approval will be Reno thirtieth March everything OK. J. C. Dodson.” That sale of cows and steers was what was known as the Metzger—

A. Kidwell, Cadwell & Metzger.

Redirect Examination

By Mr. Sims:

I stated that according to the by-laws Dodson was to have a third of the stock, I a third of the stock and

(Testimony of H. F. Dangberg.)

Humphreys a third of the stock. Dodson never took up any of the stock or paid for it; none of the stock was every delivered to Dodson, it never went out of the stock book. The Wilson deal was a deal whereby—there were two Wilson deals. One was the Wilson deal originally before we organized the Highland Cattle Company in 1912, I believe it was the month of November or December, that was a deal whereby we were buying from Wilson a certain number of head of cattle at \$25.00 per head; that is where Dodson bought personally from Wilson. On the 20th day of November, 1912, in El Paso, I assumed part of that contract. It eventually turned out to be the Robinson contract and not the Wilson contract. He switched one contract for the other. I did not think I was taking over one-half of the Wilson contract; that was the Robinson contract, I found out afterwards that the Wilson contract was merged into the Robinson contract. In my opinion, along in March, 1913, what was known as stock cattle, such as Lazy B cattle, including cows, heifers and steers, I figured they were worth \$27.00 or \$28.00 from the best information that I received. At the time I received the letter in which Dodson suggested selling the cattle close, we had other cattle besides the Lazy B cattle. We had the cattle that came in under the Robinson-Wilson deal. It was said to sell close if we trimmed the entire herd, if we owned the Lazy B. I am familiar with the by-laws of the company. Article 12 provides: "Powers of directors: The board of directors shall have the management of the business of the company and may, sub-

(Testimony of H. F. Dangberg.)

ject to the provisions of the statute, of the charter and of these by-laws, exercise all such powers and do all such things as may be exercised or done by the corporation." Article 33. "General superintendent and manager. There shall be elected by the board of directors at their annual meeting or at any meeting thereof a general superintendent and manager of the corporation who shall office at the pleasure of the board of directors. His duties will be of a general supervising nature. He shall make a monthly report to the board of directors or at such times as they may call on him for one, and shall be subject to the orders of the board and shall receive such salary as the board of directors may fix. The general manager shall have power to employ and discharge employes whenever the interests of the corporation so demand." We never carried out the provision appointing a general superintendent and manager, nor an executive committee—no salary had been agreed upon for Mr. Dodson.

Re-Cross Examination by Mr. Edwards:

It has since developed that Mr. Dodson did not give his entire time to the affairs of the Highland Cattle Company. We imagined he was giving most of his time. His family lived in Oregon, at times he went there; in some cases it is a business to have a family. He has no other business that I know of.

Re-Direct Examination by Mr. Sims:

I meant that he sometimes left there and went to Oregon. It took several weeks to go there and back.

I did not draw any salary as secretary of the Highland Cattle Company, nor did Mr. Humphreys draw

(Testimony of H. F. Dangberg.)

any salary as president. Dodson drew some money down, but not as his salary, we charged it to his account. Salaries were not agreed upon; the company was not old enough; we were going to agree on that later on. We were not running as a partnership at that time, but as a corporation.

F. E. HUMPHREY, a witness called on behalf of plaintiff, testified on direct examination as follows:

My name is Frank Humphrey. I have resided in Reno, Nevada, about twenty years and am engaged in farming and cattle raising. I am now, and have been since the incorporation of the Highland Cattle Company, the president of the company. I know J. C. Dodson. I had a conversation with him about the middle of February, 1913, part of which took place at Lordsburg and part at Duncan. Dodson, Danberg and myself were present at the beginning of the conversation. Dodson told me he could buy the "Lazy Bee" cattle at \$27.00 per head, and all the lands and calves from October, all suckling calves thrown in, in the bargain, stating that he could get terms upon these cattle. We then went to Duncan, Arizona, to see Foster. When we arrived Dodson said we would be unable to see Foster so we returned to Lordsburg. I first saw the contract known as the spurious contract (Plaintiff's Exhibit 3) about the 20th day of March, 1913, at the Overland Hotel, Reno, Nevada; Danberg, Dodson and myself were present when it was handed to me—(defendant objected to the question asked witness by plaintiff as to what, if anything, Dod-

(Testimony of F. E. Humphrey.)

son said relative to said contract, which objection was sustained by the court, whereupon plaintiff duly excepted to the court's ruling)—on the 24th day of March, 1913, an agreement was executed for the sale of certain cattle in which parties named were designated as J. C. Dodson, manager of the Highland Cattle Company, as seller, and J. G. Kidwell, as buyer. We never knew of this contract until later on. When I arrived down there in May, I did not know that it even existed. The draft drawn on the Highland Cattle Company in favor of A. C. Wilson, paid February 1st, was talked over by myself and Dodson and was drawn under my instructions.

Cross-Examination

By Mr. Edwards:

Q. Mr. Humphrey, did the Highland Cattle Company hold any meeting of its directors between the time that it held this meeting at the time of its incorporation in January, 1913, and the time you held a directors' meeting down in Lordsburg in May of 1913?

A. I don't think we held any meeting.

Q. You don't think you held any between the middle of January, 1913, and the last of May, 1913?

A. No. Possibly we held one meeting.

Q. Your minutes here would show that, wouldn't they?

A. I should think they would.

Mr. Edwards: Have you those minutes here? While Mr. Sims is ascertaining that, I will take up another line of inquiry.

(Testimony of F. E. Humphrey.)

Q. I show you a letter dated February 28, 1913. State whether you wrote that letter and transmitted it through the mails to Mr. Dodson on or about the date it bears.

The Court: It will probably be necessary, Mr. Edwards, to read the letter. That is not already in.

Q. By Mr. Edwards: That is your writing and signature, you wrote that letter, did you not? (Handing letter to the witness.)

A. Yes, sir.

Mr. Edwards: I am going to read—Your handwriting is not very legible. If you will hold that, and I will read a copy. If I make an error, you call my attention to it. (Reading:)

“San Francisco, Cal., Feb. 28, 1913.

Friend Jim:

I received your telegram and will be in Reno and get your letter explaining about Lazy Bee, and we did not let the Graves Bros. in as they are on some big trade on some land in Calif. somewhere, and did not know right now whether they could handle this or not, etc., and I told them we would not hold any longer for them so they wouldn't be in it at all so when I go to Reno will figure out whether we can handle the Lazy Bee or not. Of course if we could sell them all it would be wise to get their land and make a better plant of it for to run cattle and grow them up and if there is any way we can pull it of we will try and do it. If we can't arrange sale as we receive the stuff we could make it all right and hold onto what we

(Testimony of F. E. Humphrey.)

have money to put into it without borrowing more than we have now. Of course we may take some other strong man in with us and put it over. At any rate, when I get to Reno will advise you what I think better do. Fred is going up tonight and I will go up tomorrow night.

Yours respectfully,

F. E. HUMPHREY."

Mr. Sims: What is the date of that?

Mr. Edwards: February 28, 1913. We offer this in evidence as Defendant's Exhibit

The Court: What is the number of the exhibit?

The Clerk: Defendant's Exhibit N.

Q. By Mr. Edwards: I will ask you, where you refer in the letter—"Of course we may take some other strong man in with us," who did you refer to by that "us"?

A. Mr. Dangerg and myself.

Q. And Humphrey and Dodson?

A. Well, not necessarily, no.

Q. What is that?

A. Not necessarily; I wasn't including him at that time.

Q. You didn't consider him as being concerned with that at that time?

A. He was concerned, but he had not showed us where he put up his money in this corporation yet.

Q. Didn't you at the time you wrote that letter consider he was with you and Mr. Danberg equally at that time?

(Testimony of F. E. Humphrey.)

A. No, I did not. I considered he was just working on these trades down there and corresponding with us.

Q. You heard Mr. Danberg's testimony yesterday, did you not?

A. Yes, sir.

Q. You heard me ask him when he said, "We don't want to take in a fourth party" that the other three he considered when he wrote that was himself and you and Mr. Dodson?

A. Yes, I remember that.

Q. Was your idea as to whether Dodson was in on the deal at that time different from Mr. Danberg?

A. Well, I was never satisfied with his not coming up with his return voucher of \$20,000, showing us where he was an interested party in this concern at all times until he come up to his agreement.

Q. Have you the letter that is referred to here as being received from Mr. Dodson, explaining about the Lazy B deal?

A. No, I don't think I have; it might possibly be amongst those papers; I don't know.

Mr. Edwards: Have you that letter? He starts out in his letter, "I received your telegram and will be in Reno and get your letter explaining about Lazy Bee—"

Mr. Sims: No, I have no telegram.

Mr. Edwards: It is a letter.

Mr. Sims: From Dodson to Humphrey?

Mr. Edwards: Yes, explaining about the Lazy B deal.

(Testimony of F. E. Humphrey.)

Mr. Sims: I will have to ask Mr. Danberg. Mr. Danberg will you please step forward? I have seen no letter addressed to Dodson—oh, yes; I have that letter here. You mean under date of—

Mr. Edwards: It would be approximately under date of February 28, 1913.

Mr. Sims: It is February 26; this is the one I showed you yesterday.

Mr. Edwards: Oh, that was the letter that was offered in evidence?

Mr. Sims: No, the one written to Danberg was offered in evidence.

Q. By Mr. Edwards: Did I understand you to say that Dodson informed you that the Lazy B people were going to throw in all their land for nothing?

A. Yes, sir.

Q. Did you know how many acres of land they held at that time?

A. No; I didn't know how many acres particularly they said they had about a thousand acres of land.

Q. Didn't you know that thousand acres of land was worth about \$50,000, alone?

A. No, sir. In the average of ranch lands down there, when you run about 35 to 50 cattle on an acre, they wouldn't be worth that much.

Q. How much of that land was cultivated, did you know?

A. There was no cultivated land that I know of. There was some little orchard farm down about Duncan that I didn't know about.

(Testimony of F. E. Humphrey.)

Q. You didn't know that 300 acres of that was under water and cultivation?

A. No, sir.

Q. Did you know that the price of cultivated land and land under water was \$100 an acre?

Mr. Sims: That is objected to as immaterial; I don't know what the value of land has got to do in this case.

Mr. Edwards: It is cross-examination. Will you read the question Mr. Reporter.

(Last question read by the reporter.)

A. I never heard of any hundred dollars an acre where we were.

Q. What is that?

A. I didn't hear of any such land of the value of a hundred dollars an acre.

Q. Will you state that it did not have that value at that time?

A. Not the lands that he spoke to us about.

Q. Did you ever go over any of the Lazy B ranch prior to March 25, 1913?

A. Just went along the road where he showed us two or three mills that belonged to them, out on this plateau or mesa, as they call it, when we went through to see Mr. Foster, as I said before, on the way he pointed out these mills and says: "Those are the holdings of the Foster and Day people."

Q. You made no effort to go over the ranch itself?

A. No, because we didn't consider the ranch of any particular value at that time. We didn't know anything about it. We were buying the cattle.

(Testimony of F. E. Humphrey.)

Q. Didn't you at that time state to Mr. Dodson that the reason that you didn't want to take the deal up directly with Foster was because Dodson had commenced the deal and you thought it was better for him to go on through with it?

A. I stated to Mr. Dodson I wanted to talk to Foster myself. In such a sized deal as that, it was a large transaction, and I wanted to know all the details.

Q. All right. Did you ever make any further effort to see Mr. Foster?

A. Never did. Because I left there and came back to Nevada shortly afterwards, and he said he would be in bed for sometime, he was an old man and he didn't want to disturb him, and therefore I had no chance under the circumstances.

Q. You never made any further effort to see him?

A. Never went down there again until in May.

Q. In May, after the deal was closed.

A. After the deal was closed.

Q. At the time the Highland Cattle Company was endeavoring to get control of a large section of the range in there, several ranches, were they not?

A. Well, not particularly, no; they had all of these few bunches of cattle there; they was just trading around a little, up in the country, as I could see.

Q. Now, you say you were trading around a little. You made a deal with the Wilson people, did you not?

A. Well, we had a deal with the Wilson people that was made by Dodson away along before that we were paying on the cattle.

(Testimony of F. E. Humphrey.)

Q. How many head of cattle did that Wilson deal involve?

A. Well, I think there was about twelve or fifteen hundred cattle.

Q. Twelve or fifteen hundred cattle. The Robson deal, you were making a Robson deal there at or about this time, were you not?

A. Yes, the Robson deal—

Q. How many head of cattle did that involve?

A. There were supposed to be about 2500 head of cattle.

Q. 2500 head of cattle, this is fifty or sixty thousand dollars worth of cattle, is it not?

A. Somewhere about that.

Q. Do you call that a little deal?

A. \$25 a head was supposed to be the common price, and 2500 head of cattle would be over \$60,000.

Q. You would consider that a small deal?

A. I don't know what you call it, whether it was small or large.

Q. You say you had some small deals on there. I wanted to find out what you meant by a small deal.

A. It was not a large deal.

Q. You were dealing with Kidwell and—somebody else—Metzer, weren't you?

A. I was not.

Q. Mr. Dodson was, for the Highland Cattle Company?

A. He did at any rate.

Q. By Mr. Edwards: I show you two documents purporting to be contracts entered into on the 24th

(Testimony of F. E. Humphrey.)

day of March, 1913, by and between J. C. Dodson, manager, Highland Cattle Company, Lordsburg, New Mexico, hereinafter known as the seller, and J. G. Kidwell, hereinafter known as the buyer, acting as agents for Kidwell and Caswell of Portland, Oregon, and ask you if that contract was entered into by Mr. Dodson in behalf of the Highland Cattle Company, or purporting to be in behalf of them on or about that date? (Handing paper to the witness.)

The Court: Assuming that is a correct copy.

Mr. Edwards: Yes, assuming that is a correct copy.

The Witness: You mean that this a correct copy of what was produced afterwards?

Q. By Mr. Edwards: Yes.

A. I think so; I have no doubt that it was correctly copied.

Mr. Edwards: This contract, Your Honor, I will read part of it and offer the whole in evidence (reading):

“This agreement made and entered into this 24 day of March, March, 1913, by and between J. C. Dodson, Mgr. Highland Cattle Co., Lordsburg, N. M., hereinafter known as the seller, and J. G. Kidwell, hereinafter known as the buyer, acting as *gants* for Kidwell & Caswell of Portland, Oregon.

“Witnesseth as follows: For and in consideration of the sum of \$7000; \$28 per head for yearling steers and about $\frac{1}{2}$ 2’s.

\$40 per head for 2 year old steers and about $\frac{1}{2}$ 3’s and up.

\$40 per head for 3 yr. old steers and

(Testimony of F. E. Humphrey.)

\$40 per head for 4 year old steers and up.....

The seller agrees to sell and deliver f. o. b. cars at Lordsburg, N. M. Station, on the Southern Pacific Railroad, on or about June 15, 1913, fifteen hundred head of yearling steers, all to be full ages, June 1st, and to be buyers cut out of entire herd of sellers, consisting of about 3000 head on or about 600 head of steers, ages from 2's and up, all 2 yr. old steers to be full ages by June 1st, 1913, all of the above described cattle to be delivered in good shipping condition at the above named station and all to be in the following original brands, to-wit"—and so forth. And signed—I won't read all of it unless you care. (Continuing reading:) "Witness our hands this 24 day of March, 1913. J. C. Dodson, manager Highland Cattle Company.

Kidwell & Caswell, by James G. Kidwell."

Mr. Edwards: I was looking for those particular copies, Your Honor. We don't seem to have any copies of those drafts, although we know they are in existence. I want to show him these payments made to Dodson by Kidwell & Caswell. You are making no objections to the fact it is not the original?

Mr. Sims: No.

Q. By Mr. Edwards: I show you what purports to be a true copy of a draft dated February 15th, 1913, and I ask you if you know anything about that draft being presented for \$20,000?

A. That draft, I am sure, was written when we were in Lordsburg.

(Testimony of F. E. Humphrey.)

Q. This draft reads, "Highland Cattle Company, February 15th, 1915. Pay to the order of O. C. Wilson, \$20,000. Signed, J. C. Dodson, buyer." And it shows endorsement, "Paid February 26th, 1913." Was that draft drawn by Mr. Dodson for the payment of cattle purchased by him for the Highland Cattle Company?

A. That was a payment on a trade that he had purchased for J. C. Dodson, and we paid for the cattle.

Q. You paid for the cattle?

A. That is, we paid—he drew—we were down to Lordsburg at that time, and we mailed a check back—he drew a draft there to O. C. Wilson, and I mailed a check back up to meet the draft.

Q. It was paid by the Highland Cattle Company, was it not?

A. Yes, it was paid by the Highland Cattle Company.

Q. And for the benefit of the Highland Cattle Company?

A. Yes, the cattle were turned over to the Highland Cattle Company.

Q. The cattle were all bought by Mr. Dodson for the Highland Cattle Company?

A. No they were not bought in the first place, by Mr. Dodson. They were bought for himself, and they were *were* afterwards turned over to the Highland Cattle Company. The contract reads from O. C. Wilson to J. C. Dodson, cattle purchased. The original contract says a thousand dollars, if I remember right,

(Testimony of F. E. Humphrey.)

on October the 28th, long before these cattle were purchased.

Q. And then the Highland Cattle Company were buying a half interest in that contract?

A. No, they were paying for all the cattle.

Q. They were paying for the cattle?

A. They were paying for the cattle, yes.

Mr. Edwards: We offer that in evidence.

Mr. Sims: We object to that; on the face it says J. C. Dodson. The Highland Cattle Company is not connected with it in any way.

Q. By Mr. Edwards: I show you what purports to be a check, dated "Lordsburg, New Mexico, March 24, 1913. At sight pay to J. C. Dodson, or order, \$9000. Signed, Kidwell & Caswell." And endorsed on the back of that— Was this the personal one that Dodson got?

Mr. Danberg: That was a true copy, he took them in his own name.

Q. By Mr. Edwards: Did he endorse it over to you people, or give you a new one of his own?

A. This is not—we received no draft from those people, the check from Kidwell & Caswell.

Q. Dodson turned over \$9000 to you, however, that purported to come from these people?

A. He reported that it came from these people and gave us his personal check. The checks he had received from them he had taken in his personal name.

Q. I show you a document which purports to be a bill of sale, or advice of sale, signed O. C. Wilson, seller, dated February 15, 1913, signed J. C. Dodson,

(Testimony of F. E. Humphrey.)

buyer, and ask you if that advice was sent to the corporation on or about the date it bears?

A. I don't remember that. Probably the advice was there, if I just remembered it—

The Court: Talk a little louder please.

A. I don't remember that particular advice, but it may be there; it may have been paid to O. C. Wilson, \$20,000.

Q. By Mr. Edwards: \$20,000 for cattle—

A. That is the time I mention we were down there.

Mr. Edwards: Yes. We call for the original of this. I wanted to show that corporation did receive that. Would you admit that?

Mr. Sims: That the corporation receive it?

Mr. Edwards: Yes.

Mr. Sims: Mr. Danberg will testify to that. This witness lived away from the office of the Highland Cattle Company at Minden.

Mr. Edwards: He was president of it, and it is one of the corporation's records.

Mr. Sims: We have the originals here.

Mr. Edwards: Would you admit that this was received by the corporation?

Mr. Sims: Yes, that it was received by Danberg, secretary of the corporation.

Mr. Edwards: We will offer this in evidence. We will read it. It is on a form. (Reading:)

“Highland Cattle Company, Minden, Nevada.

We offer that in evidence as Defendant's Exhibit—

The Clerk: Defendant's Exhibit Q.

(Testimony of F. E. Humphrey.)

Mr. Sims: Same objection, if Your Honor please.

The Court: I don't see the materiality of it myself.

Mr. Edwards: Why, it shows that a purchase of \$20,000 of cattle by Dodson as buyer of the Highland Cattle Company.

The Court: It does not say so.

Mr. Edwards: Why, it is on their—it shows on the form of the advice, headed, "Highland Cattie Company." I think Your Honor had better look at that document. (Handing document to the court.)

Mr. Sims: It purports to be Dodson, buyer. As testified by this witness, he had bought these cattle in his own name away back in October, 1912, and afterwards turned them over to the Highland Cattle Company.

The Court: Objection sustained.

Mr. Edwards: We would like to have that marked for identification, Your Honor.

The Clerk: This is "Q" for identification.

Mr. Edwards: I think that is all.

Redirect Examination

By Mr. Sims:

The following letter dated February 25, 1913, addressed to me and written by Mr. Dodson is in Mr. Dodson's handwriting and signed by him:

"February 26th, 1913.

Mr. F. E. Humphrey.

Friend Frank:—I saw the Lazy B man; can trade on the lines you mapped out. Can sell and he will

(Testimony of F. E. Humphrey.)

take money at loading time up to June 1st, then will have to make a second payment. He thinks can let \$75,000 stand for a year, isn't positive yet, but thinks at least \$50,000 could let stand. I also found he had a contract for lease on seven sections absolute lease on 5 sec. and had bought 3 sec. of the land out where we were figuring on leasing. Also he was getting it at 3 cents an acre."

It is a fact that the Robson deal was made direct with Dobson in the year 1912, October or November; it was made personally between Dodson and Robson, when the Highland Cattle Company was incorporated, it took over the transaction.

I authorized the draft Mr. Edwards showed me that I stated was made in Lordsburg at the time I was there, along the middle of February; I cannot say whether it was made in my presence, I have forgotten that. Mr. Dodson stated that he would have to pay O. C. Wilson \$20,000 right away, and I told him to go ahead and draw a draft for \$20,000 to Wilson as he had to go somewhere to meet him. It was not done right there; it was done in Silver City. He had to go there to make this payment on the cattle in order to get possession of the cattle and I mailed the check from Lordsburg to Minden, Nevada, to meet this draft when it got up there, as we both, Mr. Danberg and myself, were in Lordsburg at the time looking over things.

Q. By Mr. Sims: At the time you ordered this draft honored, what was your belief as to the correct-

(Testimony of F. E. Humphrey.)

ness of that—what was your belief that \$20,000 was paid for?

Mr. Edwards: One moment. With all due respect to the court, we object to that as incompetent, irrelevant and immaterial and *heresay* testimony.

Q. By the Court: Did you have anything to do with paying this \$20,000 draft—you may object or except to any of the questions you want to.

A. No. Mr. Dangberg paid the draft.

Q. Did you know at the time it was paid that it was going to be paid?

A. I knew it.

Q. You knew it, and as president of the company, consented to it?

A. Yes.

Q. At the time it was paid did you believe that the contract that Dodson had entered into was the contract set out in paragraph 7 of the complaint—What is the number of the exhibit there?

Mr. Edwards: Exhibit I I think is the first thing they introduced.

Mr. Sims: Exhibit 1 is what is known as the spurious contract.

Mr. Wellborn: Paragraph 7 of the complaint.

The Clerk: It is Exhibit 3.

Q. By the Court: Did you believe that Exhibit 3 was the contract entered into between the Highland Cattle Company and Day and Day and Foster concerning this deal?

A. I did.

(Testimony of F. E. Humphrey.)

Mr. Edwards: Are you through with the question, Your Honor?

The Court: Yes.

Mr. Edwards: We object to that as incompetent, irrelevant and immaterial, and not binding on the defendants, as this belief was not communicated to them, or they had no knowledge; that the officers of the company had no knowledge that any contract other than the genuine one.

The Court: Objection overruled.

Mr. Sims: Did you answer the question?

The Court: He answered the question yes?

(Last question read by the reporter.)

Mr. Edwards: I move the answer be stricken out on the same ground.

The Court: The motion will be denied. Now, anything else?

Q. By Mr. Edwards: They spoke to you about the \$20,000 draft drawn on the Highland Cattle Company in the Wilson deal? Prior to that there was a \$10,000 draft drawn on you, on the Highland Cattle Company by virtue of this same deal, was there not, about February 1st?

A. Yes, sir.

Q. And that was paid by the Highland Cattle Company?

A. That draft was talked over by myself and Mr. Dodson in Reno, Nevada, that he would have to make a payment of \$10,000 on these cattle. I gave him a blank draft to draw in favor of O. C. Wilson,

(Testimony of F. E. Humphrey.)

and he sent us receipts, and so forth, for this money.

Q. This draft was drawn by Dodson, was it not, on the Highland Cattle Company?

A. It was drawn by Dodson under instruction by me.

Mr. Edwards: All right, that is all.

Mr. Sims: That is all.

The Court: Stand down. We will take a recess of five minutes.

(Recess.)

Mr. Edwards: There was just one question we overlooked asking Mr. Humphrey, and would counsel give me leave to introduce a copy of the printed form?

The Court: When you get the original, you can put it in.

Mr. Edwards: I wanted to speak of it at this time, so I would not waive my right to ask the witness.

H. L. NICHOLS, a witness called on behalf of plaintiff, being first duly sworn, testified on

Direct Examination

as follows:

My name is H. L. Nichols. I reside at Reno, Nevada, and am engaged in the butcher business. I know the Highland Cattle Company. I remember going to Duncan with Mr. Foster and one of the defendants, Mr. Dangberg, and Mr. Sims, about the 26th day of May, 1915, and I was present during a conversation of Mr. Foster, the cashier, Mr. Dang-

(Testimony of H. L. Nichols.)

berg and myself. We compared the carbon copy we had with us with the copy we found in escrow in the bank and in going over it we saw that it was a different copy.

Mr. Foster stated that the one in the bank was the one he signed.

Q. Did he state with regard to ever having signed any other contract?

A. Yes, he stated he did not sign any other. Mr. Dangberg and Mr. Sims then stated that they would repudiate the contract and ask for the return of the money.

Q. You seem to have an interest in this thing, did you at that time?

A. I was a stockholder, yes.

Q. In this Cattle Company?

A. Yes, sir.

H. F. DANBERG, recalled by the plaintiff, testified as follows, to-wit:

At the time I paid the draft of \$20,000 drawn by Dodson in favor of Day and Foster, it was paid out upon the advice which corresponded with his carbon copy of contract, and I believed the carbon contract was the contract upon which the money was paid.

S. A. FOSTER, a witness called on behalf of the defendant, being duly sworn, on

Direct Examination

testified as follows:

I reside at Duncan, Arizona, and have been en-

(Testimony of S. A. Foster.)

gaged in cattle raising and farming for about eight years. I was one of the partners of the firm of Day and Foster. As to the extent of real estate that was owned by Day and Foster on the 23rd or 25th day of March, 1913, I think the deeds called for something over 1,000 acres and we control a country about 20 miles each way, I guess, that runs up and down the Gila River north and south, to a big range of mountains that is supposed to be the dividing line between the ranches. Our ranch extends about twenty miles along the Gila River. The cultivated land of the ranch is separate from the cattle business; it all went into this deal—we have something like 300 acres under the ditches. There are two ditches on the north and south of the Gila. The names of the ranches we were going to convey to the Highland Cattle Company were the "Home Ranch" in Arizona, through which the Gila runs and contains 280 acres on that piece. The river runs through it and it is divided into three tracts; the New Mexico land, we count that two ranches, but since then we have sold it into one and sold all the real estate on the north of the river in New Mexico. That was since 1913; and we owned a river front that we use in New Mexico. I guess it is about a mile and a half along the river. That consists of about 300 and some odd acres of land. We have a ranch that we call the "Cottonwood," east and a little south of the river. Those are the cattle ranches; there is 80 acres of that; and then we have lot four which is still on east of that, and away up into what we call

(Testimony of S. A. Foster.)

White Rock. There is 40 acres of deeded land of that. The east ranch is where one of our men lives and we have 40 acres of land there. It has two big pastures. West of that we have another ranch with three big windmills on it, and there is 40 acres of deeded land and a big windmill and gasoline engine. There is two big pastures there. Then we have some state land east of that place—two sections, I believe—and applications for some more. The ranches were all improved. As to the reasonable market value of our ranch property on or about the 23rd day of March, 1913, the farming land is generally known to be worth about \$100 an acre unimproved, that is just under cultivation. \$50,000.00 is what it was put in at and it was very cheap, as we consider it; its reasonable market value at that time. I have been engaged in the business of mostly raising and selling cattle for a number of years. I am familiar with the market price of range cattle on the 23rd of March, 1913, in Arizona; the market value was \$30 and \$50 for calves. I remember meeting J. C. Dodson sometime in December, 1912. Lordsburg was where I first met him. He wanted to get prices on the Lazy B ranch. He wanted to buy us out—buy the cattle and ranches. He said they were forming the Highland Land and Cattle Company. I don't know as there was very much more said at that time. He wanted our outfit and wanted to get control. He said they were anxious to control all the country around to Lordsburg and wanted to buy our outfit out.

(Testimony of S. A. Foster.)

Our cattle ranged away as far as sixty or seventy-five miles—they drifted that way but we drive them back home every time we catch them. That country is known as the open range. We control the water and the cattle run over the government land; whenever you put down a well you have to protect it by deeded land. I again met Dodson about the 15th of February, 1913, when he came to Duncan. He came to Duncan and came out home with me. I had a conversation with him at that time. I guess he and I were the only two that were together that afternoon, but I took him up to my ranch, and my brother, and Mr. Dodson wanted to look over the outfit. This was about the 15th of February as well as I remember. Mr. Dodson said he was buying for the Highland Cattle Company. He wanted me to set a price on the outfit. I had talked with Frank Coon at Lordsburg and told him that I would show Dodson the outfit when he came down. When he came down I took him out home with me and the next day we went up to what we called the Gila, up the river, in a buggy. I showed him the real estate in New Mexico and as we came down the river I showed him the Arizona ranches, and before we got home he said, "I think you are a little high on the outfit." I says, "You have not seen it all." I told him the price was \$50,000 for the ranches and real estate—the cattle ranches. And \$200,000 for the cattle. So the next morning we took a horse each, and went on the range, what we call south of Duncan, and through our mountain country and in by the horse

(Testimony of S. A. Foster.)

camp, which was another ranch we had, and went on to a neighbor of ours by the name of Pierson and stayed all night, and went in on the Lordsburg south of the High Lonesome Ranch. That is one of the ranches that I spoke of having the 20-foot mill on it. We went on into Lordsburg and Dodson and I were there for awhile and he said to me, "We had better get together. I have got to get away. We will put that proposition up to Mr. Day and can handle the outfit at the price you mention." That is, \$50,000 for the ranches. Mr. Day is my partner. And I told him then—at that time he wanted to know if Mr. Day would take a mortgage on the outfit at \$75,000, and I wrote to Mr. Day and he wrote back and said yes, he would take a mortgage on the outfit at \$75,000 at 8 per cent interest. But before the mortgage was to be drawn up he wanted to be in Arizona to see the way the mortgage would be drawn. At that time we gave Dodson the choice on the trade, either to tally the cattle or lump the cattle off at \$200,000, and \$50,000 for the ranches. I put that proposition before Mr. Day and he told me that he was willing to go ahead and do that and take this mortgage on the outfit at \$75,000. Then, I think it was—it was the day before the contract was drawn up that I got a telegram from Mr. Dodson that he would meet me at Duncan next day. In the conversation I had with Mr. Dodson at the time he came down and looked over our ranch he said he was manager of the outfit, the Highland Cattle Company. He came back and went away and I don't

(Testimony of S. A. Foster.)

know where he went to, but he was not around Duncan any more till the 24th or 25th of March when the contract was drawn. He sent me a telegram the day before. I met him in Duncan the next day at the train. I met him at the train, and he said, "I have come down to fix up that contract on those cattle." I says, "You will have to wait untill Mr. Day gets here." And I explained to *to* him the same reason that I did just now, that Mr. Day would take a mortgage on the outfit for \$75,000. Well, he says, "There is no use to do that. We have arranged for cheaper money than 8 per cent, and we don't want to give a mortgage on the outfit. It will be all cash on the 20th of June," when I believe the rest of the money was due. Then the question came up as to how he was to receive, whether tallying or lump in trade. He said he had been over the ranch and knew enough to take it at a lumping trade for \$200,000 for the cattle and \$50,000 for the ranches. After we talked over the trade we had *lanneau* draw up the papers. At the time we went to the bank we went in there to ask *Lanneau* if he would draw up the papers on this contract that he did draw up. Mr. Dodson said at the time that he was buying for the Highland Cattle Company and signed the papers as manager of the Highland Cattle Company—he said he was manager of the Highland Cattle Company, there in the bank. We outlined the terms there in the bank, and so he made a remark there again about this money, and he says: "We will take the lumping trade at \$200,000 for the

(Testimony of S. A. Foster.)

cattle and \$50,000 for the ranches." And as Lanneau outlined it down, it went down to where it says "Bill of sale for all the cattle of a certain brand," he says, "What number will you put in?" I said, "There is no need of putting any number." And he said, "How many will you guarantee?" I said we wouldn't guarantee any. "If we did, you would have to pay for what came over the \$200,000." He says, "I want our men to know what we are getting." I made the remark that we would put in 7000 cattle, more or less." He said, "All right." The deed called for a thousand acres of land, more or less, and at that time we had about 90 head of horses, and I said "90 head of horses, more or less," and the contract was drawn up in that form, and I signed it for Day and Foster and he signed it for the Highland Cattle Company, "J. C. Dodson," as manager. That was document purporting to be contract (Defendants' Exhibit "R.") The bill of sale (Defendants' Exhibit "S") referred to in said contract, was drawn up by us and was executed on or about the date it bears. These contracts were drawn up by B. R. Lanneau, who is a banker in Duncan. The bill of sale I think refers to cattle only by the brand. All the cattle branded as the Lazy B. The major portion of our cattle were branded Lazy B. "W. I. C." on the left side, and Z-bar L on the shoulder, and there is a Z on the shoulder and bar on the side and L on the hip. That constituted most of our cattle. We only kept up the one brand. The increase or calves of these other cattle we put the Lazy B on.

(Testimony of S. A. Foster.)

This bill of sale covers all the cattle owned by Day and Foster on that day. Mr. Dodson read over the contract at the time he drew it up and helped dictate the contents. Mr. Lanneau made two carbons of the contract, he gave me one and Dodson one and kept this one in escrow to stay there till the rest of the money was paid over. I don't think that the other two carbons were signed by the parties—we just signed this one.

The question came up as to the first payment, and I objected to the \$20,000 and told him that anyway he ought to pay \$25,000. He said he had only arranged for \$20,000 but that the other would be due soon and that I would still have possession of the outfit till the rest of the money was paid, and also he arranged for me to go ahead and he would pay me \$75,000 a month. He gave me a draft of \$20,000 after we went to the bank, on the Highland Cattle Company, signed J. C. Dodson, manager. That is the draft in evidence I suppose. I received that money.

I did not see Dodson again till I went to Lordsburg, when they were gathering the cattle about the 15th day of May, 1913, at that time he wanted me to help Roberds work the range and gather those cows that he sold to Metzel. He told me that he had sold some of the Lazy B cattle to Metzel. He made a contract with the Kidwell and Metzel outfit, or represented to me that he sold 4500 head. I went over to Lordsburg with a bunch of horses. When I got over to Lordsburg some of the boys came to

(Testimony of S. A. Foster.)

me and said they were branding these B calves with the Box M brand. That was the Highland Cattle Company's brand at that time. I went to Roberds, who was the ranch foreman, the man who works on the range—for the Highland Cattle Company. I told Mr. Roberds "There is some mistake someway about your branding the B calves with the Box M." He said: "There will not be many here today and we will not brand them, and you can go and see Dodson." So they didn't brand the calves that day, and I went to town and saw Mr. Dodson and I said: "Mr. Dodson, Roberds misunderstood you some way or another. This B brand is to be up till you pay the \$230,000." Dodson says: "Yes, he misunderstood me. We will have no more of them branded with the Box M brand." So I worked on with the wagon and we got through working at Lordsburg and moved on to what they call Adobe, where they were camped, but it was Hackberry where there was a lot of cattle. And then we went to one of our mountain ranches about 12 miles or 14 miles from Adobe, and when he got over there we rounded up at the horse camp, and the next morning about daylight, Joe Olney brought me a note. He wanted me to get to Duncan before they did. That is, Mr. Dodson wanted me to, and to change that contract so as to read guaranteeing 9000 instead of 7000 more or less. So that Roberds and the cowboys that were going back to Adobe, which is the ranch that the Highland Cattle Company owned. I helped brand some calves that were going to the river north of

(Testimony of S. A. Foster.)

there, and I went to Duncan about between 2 and 3 o'clock to meet the Highland Cattle Company outfit and also Mr. Dodson. He mentioned Humphrey and Dangberg that were coming to Duncan the next day. I got to Duncan and there was nobody there, but Dodson had left word, or sent word over the phone to the bankers to bring me to Lordsburg. So we went up to Lordsburg that night and met Dodson this side of Lordsburg. I asked him what was doing, and he says, "I can square myself with \$30,000," and he said "I wouldn't ask you to change that contract, but if you will stand good for \$30,000 I can square myself with the Highland Cattle Company." I told him I wouldn't do that any more than I would change the contract. Then Dodson got into the car and rode up with Lanneau and myself and got off the car and I didn't see him any more till the next day or the next. That was when the Highland Cattle Company had taken over the outfit.

I went back to Lordsburg the next day and was talking to Mr. Humphrey and Mr. Dangberg. And they were going to ship these cattle there either that day or next day and I told them that there was something misunderstood about the contract and that we wanted the money in the bank before these cattle were shipped, and they said they thought they would get loose from shipping any of the cattle, and after they got loose from Mr. Metzler, that is when they wanted me to pay back the \$20,000. They didn't ask me that day at Lordsburg to pay back the \$20,000. They didn't say anything about Dodson's authority.

(Testimony of S. A. Foster.)

I don't know exactly which one I was talking to, but there was one of them took out the herd of cattle that day and was trying to settle with Metzler. It was either Mr. Humphrey or Mr. Dangberg that was talking to me. Outside of Dodson those were the only ones that I knew. This conversation took place about May 23, 1913. No, it was the next day after—it was the day that they said they bought that Metzler contract. I think it was the 24th. I heard them testify that they went over to the Bank of Duncan on or about the 25th of May, 1913. The way this happened they were asked about that contract; after they had bought Metzler out they wanted me to pay back the \$20,000. The first time they asked me to pay back the \$20,000 was back in the First National Bank of Lordsburg in the room. As well as I remember it was the 24th of May. They showed me this contract with Dodson, where it said 9,000 head of cattle more or less," and they showed me this receipt showing 9,000 head of cattle more or less, and I told Mr. and I told them we were not going to guarantee anything. They said they were not surprised at any contract Dodson would make because he had done them up on every contract he had ever made with them. They showed me the Metzler contract where they bought over the Metzler property, so they said. I had a conversation with them at Lordsburg after they bought the Metzler contract—I don't know what day it was—anyway they told me that they had just made the arrangement with Metzler to turn these cows loose and that they wouldn't

(Testimony of S. A. Foster.)

ship these cattle. It was the 24th or 25th. It was before we went to Duncan. They said Dodson made a contract they could not afford to fulfill; that the buyer's cut would mean all the younger cut, while the seller's cut would mean just the opposite. The rules of selling in that country are that if you sell the seller's cut you would sell out the stuff that you wanted to sell. With the buyer's cut he takes a per cent of the best stuff you have got. So my understanding was that they would give Metzel \$2500—and give back that contract where it says "Buyer's cut." We then went to Duncan and called Mr. Lanneau and went to the bank to look at the original contract. We went in there and I think Mr. Dangberg or Mr. Sims had a contract with them—supposed to be a copy of the one in the bank, and said: "We want to see if this is like the one you have in escrow." Mr. Lanneau looked at it and said that it was not. Mr. Dangberg asked why he thought so and Mr. Lanneau said it was a different type altogether from what his typewriter was. They talked about Dodson mostly and about the contract he made with Metzel and Wilson and Roberds and Robinson, on behalf of the Cattle Company.

It was just before we started for Lordsburg that Dangberg said, "Foster ought to give us back the \$20,000." He stated that Dodson had never made a contract that was what he represented it to be. He just said they had to buy the Metzel contract which was not what was represented, but they never said anything about his not having authority to make this

(Testimony of S. A. Foster.)

trade. They said he misrepresented this contract and showed us the one he sent them. They did not say anything about Dodson not having authority to make the Lazy B deal. (Defendants' Exhibit "T.")

I think that was about all that was said, and we went back to Lordsburg that night, and the question came up over our steers the next day or the next day. I have forgotten just what it was, about shipping the steers they had gathered. I told them that they could ship them by putting the money in the bank at Duncan, and they went out and turned our steers loose and would not ship them, that was Mr. Dangberg. They did ship their steers either the next day or the day or so after that. The question came up as to what to do with this money that these steers brought and Mr. Dangberg seemed to want to hold it in the Lordsburg Bank, where this stuff was being shipped till the \$20,000 deal was settled, and I told him not to ship until he put the money in the Duncan Bank where the papers were, and they went out in the automobile and turned them loose on the ranch. They had some of our Lazy B cattle gathered with these cows. These steers that were to be shipped we were to get credit for them, but they wanted to hold the money till this \$20,000 was settled, and I told him provided they put it in the Duncan Bank they could ship the steers, and they decided to turn the steers loose. The next time I saw Mr. Dangberg or Mr. Humphreys and had a conversation with them was sometime after the first of June when Mr. Day was there at Lordsburg. I also had a talk in the Duncan

(Testimony of S. A. Foster.)

Bank. The first conversation was in the bank in Duncan, Mr. Dangberg, Mr. Day and myself being there, and Mr. Lanneau was in and out; he was cashier there and we were talking over the proposition of trying to get together on this \$20,000. Mr. Day asked Mr. Dangberg if he didn't think that the fact that 9,000 head of cattle was on this contract, that that was misrepresented in the first place. He said: "Well, we did think we had a good deal." That was about all I heard him say. I heard Mr. Day say that to Mr. Dangberg and Mr. Dangberg made that reply. Mr. Day said to Mr. Dangberg, "The fact that you were getting 9,000 head of cattle for \$200,000, that you made an awful good deal." Mr. Dangberg kind of laughed and said, "We did think we had a good deal." And Mr. Day said "It was a misrepresentation on the face of the contract." When we were ready to go Mr. Dangberg said, "We will let the lawyers settle it." That is about all I remember. Mr. Dangberg never did object to Mr. Dodson's authority.

He stated the reason he did not see me was because Dodson told him I was an old man and he told Dodson to go ahead and finish the deal with me after he had started it. This conversation took place at the Bank of Duncan between Mr. Dangberg, Mr. Day, Mr. Lanneau and myself. I signed the receipt produced by Mr. Dodson for \$20,000 paid me by the Highland Cattle Company, as I remember he tore the receipt out of a book he had there—a book he had folded up in his pocket; this was at the time

(Testimony of S. A. Foster.)

the contract was signed in March. The blank was filled in by Mr. Dodson. The middle lines of the receipt speaking about the number of cattle, appeared in different colored ink, light or blue ink, it was not in the receipt at the time I signed it. The words I refer to are as follows: "there are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land all leased, etc." That part was not in the receipt when I signed it. I do not know of Mr. Dodson's writing that in there later; the next time I saw it was in Lordsburg, or the day before we went to Duncan; I believe it was when we went to Duncan, or the day before, I don't remember which. I never saw the receipt with those words added in there until it was shown to me in the latter part of May, 1913; they were not in there. I never told Mr. Dodson to insert that portion in the receipt. I did not have the least idea it was in there; I didn't tell anybody to put it in over my signature. Mr. Day was not even in Nevada or Arizona at that time.

This receipt was first shown to me after it was signed at the First National Bank in Lordsburg about the 24th or 25th of May, at the time that contract was—to turn those cattle loose; I think it was the day we went to Duncan, or the day before; I don't remember just exactly. It was before we went to Duncan. I think Mr. Sims had it, either him or Mr. Dangberg, they had it in the house. They asked me if the receipt was like it was when I signed it. I told them no and said this 9000 head was written in there, because we didn't guarantee any number, and I says,

(Testimony of S. A. Foster.)

“You can see this is a different ink,” and Mr. Dangberg said, “It is fading.”

Q. Now, prior to your entering into the contract with—Mr.—the contract of March 23, 1913, with Mr. Dodson, which is in evidence here, as manager of the Highland Cattle Company, had you been informed by any person of the Highland Cattle Company, had you been informed by any person there in that territory, concerning Mr. Dodson, as representing the Highland Cattle Company?

A. Mr. Dodson told me when he came down to look over the ranch, that he was the general manager, buying up these ranches, and asked me about Henry Martin’s outfit, and asked me all about the different ranches around there in the country, and I told him the best I could. Mr. Wilson also informed me of Dodson’s representing the Highland Cattle Company. This was along in January or February, the last of January or the first of February, before this contract was signed, at the Wilson ranch.

Q. Did you have any talk with Mr. Wilson of the Wilson ranch prior to March 25th, 1913?

A. Yes, sir.

Q. Did you have any conversation with him concerning any sale by them of cattle to the Highland Cattle Company?

A. Yes, sir.

Q. When did that conversation occur?

A. Well, it was along the latter part of January, or the first of March, when I was talking to Wilson.

Q. And whereabouts?

(Testimony of S. A. Foster.)

A. At Lordsburg, and then at the Wilson ranch.

Q. Now, referring to the one at Lordsburg, who was present at that time?

A. Well, I don't know of anyone that heard the conversation except Wilson and myself.

Q. State what was said *that* that time by Mr. Wilson to you concerning any sale of cattle by them to the Highland Cattle Company?

Mr. Wellborn: That is objected to as incompetent and hearsay.

The Court: Objection sustained.

Q. By Mr. Edwards: At the time you entered into this contract with Mr. Dodson as manager of the Highland Cattle Company on or about the 25th of March, 1913, did you enter into it with the belief that Mr. Dodson was entering into the contract as manager and agent of the Highland Cattle Company?

Mr. Wellborn: If the Court please, just for the sale of the record, that is the third or fourth time that he has described that contract as a contract made as general manager of the Highland Cattle Company.

Mr. Edwards: It so states on its face.

Mr. Wellborn: On the contrary, it does not; that is the very issue of the case; it is easy enough to refer to the contract as an exhibit.

The Court: I think you had better conform to Mr. Wellborn's suggestion in that regard, and refer to it as an exhibit.

Mr. Edwards: Let us see, what is the exhibit number?

The Clerk: Exhibit R.

(Testimony of S. A. Foster.)

Q. By Mr. Edwards: At the time you entered into this contract—signed this contract marked Defendants' Exhibit "R" did you believe that Mr. Dodson had authority to sign on behalf of the Highland Cattle Company?

A. Yes, sir.

Q. Did you believe at the time you entered into that contract with him that he was, in fact, the manager of the Highland Cattle Company?

A. Yes, sir.

Mr. Edwards: Do you people deny the tender on the part of Day and Foster, and readiness to perform this contract, Exhibit R?

Mr. Sims: With reference to performing it?

Mr. Edwards: Yes, our tender to you.

Mr. Sims: On the 20th of June of the notice—we will admit receiving the notice on or about the 20th of June drafted by Day and Foster's attorneys. I believe I have copies here.

Mr. Edwards: Have you a copy of the notice served on you there?

Mr. Sims: There is one dated the 12th of August, 1913. Is that the one you want? We have one dated in August, 1913.

Q. By Mr. Edwards: Did you meet Mr. Dangberg at the bank of Duncan on or about the 20th of June, 1913?

A. I think it was about the 20th.

Q. Did you make any tender to him at that time of any deeds or bill of sale to the cattle and ranches

(Testimony of S. A. Foster.)

of the Lazy B of Day and Foster in accordance with the terms of the contract?

A. The bill of sale and the deed that was in there?

Q. Well, did you make any tender to him of the bill of sale and deeds at that time?

A. The 20th of June?

Q. Well, on or about that time?

Mr. Edwards: Unless counsel will admit that, we will take steps to prove that we had in the bank at that time, and tendered abstracts and deeds and bill of sale. Do you make any point of that?

Mr. Sims: I forget the date that you made that tender. If you made any—I have August 12th.

Mr. Merriam: The deed called for in the contract—the contract calls for this to be consummated on the 20th of June, and we had the deeds already there, including abstracts and everything else.

The Court: How is that? Bill of sale and deeds that were in the bank?

Mr. Sims: Yes.

Q. By the Court: You had an abstract of title. Did they call for an abstract?

A. Yes, that is, a clear title, and we made an abstract.

Q. And you had it ready to sign?

A. Yes, sir—yes, sir.

The Court: Now, there ought not to be much time taken up about this.

Mr. Edwards: Well, I think we have to prove that we were willing and ready to perform under our terms of the contract.

(Testimony of S. A. Foster.)

Q. By the Court: Were you ready and willing to perform the contract?

A. Yes, sir.

Q. And you had the abstracts made out in accordance with the contract?

A. Yes, sir.

Q. Did you tell them you had it?

A. Yes, sir.

Q. By Mr. Edwards: And the deeds to the property?

A. Yes, sir.

Q. You had them ready at the bank?

A. Yes, sir.

Q. And the bill of sale to all the cattle?

A. Yes, sir, it was all executed and put in the bank there.

Q. Did you tell Mr. Dangberg you had them there?

A. Yes, sir.

Q. What did he say, do you remember?

A. Well, he made the remark that Dodson had done them up in a way that they did not—couldn't raise this other 230,000, but wanted to borrow \$100,000 from Mr. Day in Lordsburg there, provided they went ahead with the deal, at 6% interest, and Mr. Day said if the security was gilt-edged it would be all right, but he didn't go ahead with the deal.

Q. Did he tell you at any time—

Mr. Sims: I object to leading the witness, Mr. Edwards.

Q. By Mr. Edwards: Did he tell you at any time

(Testimony of S. A. Foster.)

about whether he was willing to go on with the deal, or desired to go on with it or not?

A. He just said that Dodson had done him up on those other contracts.

Q. By the Court: That is all he said on the subject?

A. Yes, sir.

Q. By Mr. Edwards: These abstracts of title and deeds that you referred to covered all of your property, did they?

A. Yes, sir.

Q. And they were all on deposit there in the bank at Duncan at that time?

A. On the 20th of June.

Q. On the 20th of June, 1913?

A. Yes, sir.

Q. And would you at that time have delivered the same to the Highland Cattle Company if they had paid the \$230,000 as specified?

A. Yes, sir.

The said bill of sale is as follows: (Plaintiff's Exhibit "S.")

PLAINTIFF'S EXHIBIT "S."

Cross-Examination.

I met Mr. Dodson in February, 1913, at Duncan and he spoke about buying our folks out. Prior to that time he had not directly spoken to me but through Kuhn and a bunch of them at Lordsburg. It was not but a short while prior to that February conversation I

(Testimony of S. A. Foster.)

had with him, something like a month. The first time that Dodson came out and went over the range with me was about the middle of February. I couldn't tell you what day I first became acquainted with Dodson. I had heard of him before I met him. To the best of my recollection I met him along in December or January somewhere.

Q. Along in December or January when you first met him, did you have any talk about looking over the Lazy B?

A. Just a little about joining the two outfits you know.

Q. Did he say something about joining the two outfits?

Q. He referred to the cattle he had bought from Robinson and Wilson, did he not, joining them with yours?

A. That was in February that we talked that over.

Q. You don't remember anything that was said in December when you first met him?

A. No.

Q. Do you remember a conversation that you had with Mr. Humphrey near Lordsburg, or at Lordsburg sometime in the early part of May when Mr. Humphrey was down there by himself, about wanting to know when the chutes were to be sent out to your place so that your cattle could be counted out?

A. No; no, I don't remember that.

Redirect Examination.

Q. Mr. Sims called your attention to the fact that at that time Mr. Dangberg said that he told Dodson

(Testimony of S. A. Foster.)

as long as Dodson had started in on the deal that he would let him finish it?

A. Go ahead; yes. That was what was said at that time by Mr. Dangberg.

Q. Mr. Sims asked you if the land that you had and your ranches which were under water, under cultivation, formed part of your cattle ranch, and I understood you to say it did not?

A. It forms part of the \$50,000. You see, on real estate outside of horse feed and stuff that is raised on the farm, is what we use on the cattle ranches. The other is sold separate from the cattle ranch. This irrigated land all went in on the \$50,000 deed. That was in answer to the question whether it went in or not. I offered to sell the range and have the cattle and the cattle ranches go in, for this \$50,000 real estate constituting this \$50,000, all went in in Mr. Dodson's trade. I showed Mr. Dodson this cultivated land, I showed him all of the real estate.

CHARLES A. MARTIN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

I reside at Silver City, New Mexico. I am engaged in the cattle business principally, and have been so engaged for twenty-eight years. I am engaged in buying and selling cattle and cattle ranches and lands. I am familiar with the market condition of cattle, range cattle in the territory around Duncan, New Mexico, in March, 1913, I should say, owing to the grade of

(Testimony of Charles A. Martin.)

cattle, anywhere from \$27 or \$28 to \$35. There is a big difference in cattle in that country; some are better bred than others. I know of the cattle in this deal that was on this range in controversy. I was offered \$32 a head for my cattle. That means with that year's calves thrown in, not the cows; I was offered \$32 for my cattle that year and I think these cattle were worth \$32. Mine are north of the river, fifty miles away. Ninety head of horses are worth, I should say \$50 around. I know this range in controversy very well, I should say it is worth \$50,000; I don't think it could be bought for double that now, it was worth that at that time; of course that is only approximate. It is hard to tell what a range is worth. I think that is a very reasonable value of it. I am familiar with the custom of selling cattle in that country around Duncan in all the years.

B. R. LANNEAU, called as a witness on behalf of defendants, being first duly sworn, testified on direct examination as follows:

I reside at Duncan, Arizona, and am the cashier of the Bank of Duncan, Duncan. I have been engaged in the banking business about five and one-half years. In that capacity I have become acquainted with the market price of cattle bought and sold in that vicinity—deals of cattle that would pass through our bank. I am familiar with the reasonable market value of range cattle in March, 1913. It was anywhere from \$27 to \$31 for yearlings. I am acquainted with Mr. Foster and Mr. Dodson. I first met Mr. Dodson several

(Testimony of B. R. Lanneau.)

weeks before the contract was entered into between him and Foster. I had a conversation with Dodson in relation to whom he represented, when he and Mr. Foster came into the bank and requested me to draw the contract for them. There was quite a little discussion before the contract was drawn as to what sort of contract they wanted to make. Mr. Foster made the proposition that they would sell their outfit for \$250,000 just as it stood without any tally or anything, or they would sell their land for \$50,000 and tally the cattle off. That is, count them off at \$30 a head for everything except calves, which would come in at \$15 a head. Mr. Dodson said that he didn't care to tally them off; that he had been over the range several times and was satisfied with the value of the land and also with the value of the cattle on the ranch; that it would be a great deal of work and trouble to tally them out, and asked me to make the contract for \$250,000 for everything owned by Day and Foster. He asked Mr. Foster how many cattle he had on the ranch and Mr. Foster said he thought he had about 7,000 head of cattle and about 90 head of horses and about one thousand acres of land. I asked Mr. Dodson in making this contract out whether to make it the Highland Cattle Company or how; he said to have it signed and he told me to make it to J. C. Dodson, manager of the Highland Cattle Company. I asked Mr. Dodson about his authority and he said he had authority to sign and tie the company up on these contracts, and that he would give us a draft on the Highland Cattle Company for \$20,000 and as the papers were all to be left

(Testimony of B. R. Lanneau.)

in the bank in escrow, we were taking no chance, and if the \$20,000 was paid it would prove his authority for making these contracts for the Highland Cattle Company, and from that represented we proceeded to execute and draw up the contract. I drew up the contract for them at that time.

Mr. Edwards: I guess there is no dispute but what the documents you claim are spurious contracts were not written by Mr. Lanneau?

Mr. Sims: No; we don't claim that they were.

Mr. Lanneau: The first time that I saw plaintiff's exhibit 3 was when Mr. Sims and Mr. Nichols and Mr. Dangberg and Mr. Foster came to Duncan and asked me to let them see the contract that I had in escrow, and Mr. Dangberg presented me with this so we got the original out and asked me if it was a duplicate of the contract that I had made. I told Mr. Dangberg that it was not. And he remarked that I had better read this over first before I was so sure about it, and I told him that it was different from the type on the machine I used, and on the machine on which this contract was written was so different there was no question about it. I saw the document marked defendant's Exhibit "U." In making that contract out Mr. Dodson asked to have a duplicate of it made and he also had these blank receipts. These blank receipts were like Exhibit "U." He said his reason for wanting a receipt and also copy of the contract was that he could send it in to Nevada and show them the sort of contract he had made, and that receipt was to verify the draft for \$20,000. Parts of

(Testimony of B. R. Lanneau.)

that receipt were filled in, in my presence at that time. The portion of the receipt in light blue ink "there are about 9000 cattle above October calves and about 90 horses and 1000 acres or more deed land all leases, etc.," was not written in my blank at that time. I saw Mr. Foster sign the receipt. We did not have any ink in our bank of the character that would write as those words were written. We only use one kind of ink and that is what the rest of it was written in. I don't recall any further conversation as to Dodson's authority or anything of that sort at that time. I don't think I saw Mr. Humphrey at any time, but I saw Mr. Dangberg when he came up to Duncan to examine the contract that was in escrow in the bank. Don't remember what date that was, it was sometime after the contract was executed in the bank. At that time Mr. Dangberg said he would like to look over the contract that was in escrow in the bank and we went into the bank just after dark in the evening and I gave the original to Mr. Dangberg and he and Mr. Sims and Mr. Nichols compared it with the supposed copy that they had in their possession. After going over the contract and during the time that these gentlemen were examining the contract, they said Mr. Dodson had sent not the copy of the real contract but another copy, and I don't remember the words now but they were talking about Mr. Dodson's being crooked and having gotten into trouble over some of these things. I don't remember anything being said or any conversation as to his authority one way or the other, only they said he had been crooked with

(Testimony of B. R. Lanneau.)

them and gotten into trouble over these contracts. Day and Foster subsequently, prior to the 20th of June, deposited in our bank, bills of sale and deeds and abstracts of all their property and they were there on the 20th of June, they were there probably within a few days after the contract was left in escrow. Foster had the abstracts made as soon as it was possible to get them, and then the deeds and bill of sale were made out and put with the contract. Nobody representing the Highland Cattle Company did, either on or about the 20th day of June, or at any time, tender any money for these deeds or ask for them. These documents have remained in my possession up to the present time. The only other conversation that I recall of having with Mr. Dangberg about this business was immediately after these gentlemen in the bank completed their examination of this original. We were all outside on the street and discussing the matter and talking about the way Mr. Dodson had done in these matters and Mr. Dangberg at that time, all *all* were more or less joking and talking about it, and he told Mr. Foster he thought they ought to have their \$20,000.00 back, and Mr. Foster laughed and told him the \$20,000 had all been loaned out and he said "Oh, if you assign the note we will accept that." Foster said "I can't do that at all. We will have to look into these. Anyway, I would not make any statement or do any business at all without talking to Mr. Day." That is about the only other conversation that Mr. Dangberg and I ever had in connection with this contract, or with Mr. Dodson. I did not, at that time

(Testimony of B. R. Lanneau.)

when they were in the bank together, hear Mr. Sims or Mr. Dangberg say that they repudiated the contract and demanded the money back. The only demand or talk of the money being paid back that I recall was just the conversation which I stated took place outside of the bank after we got through in there. I did not hear any statement at that time that they repudiated the contract, only that Dodson had been crooked with them, and the conversation I have repeated with Mr. Foster as to returning the \$20,000. That is all the conversation I now recall in connection with that.

Cross-Examination.

I don't remember that Mr. Dangberg or Mr. Sims or both of them informed Mr. Foster that the Highland Cattle Company repudiated the contract that was in my hands in escrow, and demanded the money back—I won't say that they did not say that. I think I probably would have remembered it if they had made any demand and repudiated the contract in my presence. There was a great deal of discussion among the four of them. I had no interest in it except as cashier of the bank with these papers in my charge. Being situated as I was and it being a novel situation, I was interested in what was going on and if they had used language of that kind and I had heard it I think I would remember it.

Redirect Examination.

Q. Did you at any time during this conversation at which Mr. Dangberg was present hear any statement made by Mr. Dangberg, Mr. Humphrey or anyone, representing the Highland Cattle Company, to the ef-

(Testimony of B. R. Lanneau.)

fect that Mr. Dodson had no authority to enter into this contract?

Mr. Sims: The witness has already answered that. He stated the conversation, and the same question was asked and he said no.

The Court: I think he has gone over that.

Mr. Edwards: I wanted to be sure that I had covered it. I apologize for asking it again.

The Court: He detailed the conversation.

Mr. Edwards: He detailed the conversation, but I wanted to bring out the fact that such a statement—

The Court: You have a right to negative what they testified to, by this witness—that it did not occur. Now, I have understood his testimony that he has already stated that there was no such language used, to his memory, that they repudiated the contract.

Mr. Edwards: That is clear. Now I want to get out if there was any statement at that time that Dodson had no authority.

The Court: I will let him testify to it again.

A. No, sir.

B. B. OWNBY, a witness called on behalf of the defendants, being duly sworn, testified on

Direct Examination

as follows:

I reside at Lordsburg, New Mexico, and am engaged in the garage business—automobile business. I know J. C. Dodson and know Mr. Dangberg and Mr. Humphrey. I know where the Day and Foster ranches are around Duncan. I drove Mr. Dodson and Mr. Dang-

(Testimony of B. B. Ownby.)

berg over the Day and Foster ranges at different times in the spring of 1913. I took them over about all of the ranges but not the ranches. I don't know as it was particularly the Day and Foster cattle that they looked at on that trip. When we would drive out and look at a bunch of cattle Mr. Dodson would tell these gentlemen there was so many Box M's and so many Lazy B's in a bunch of cattle when we would drive up close to them. I don't recall how many times I took them over this range. I couldn't say as to whether some of the times were prior to March 25, 1913, I hauled them around there a good deal along through the year of 1913, but I couldn't tell you the date; it was in the spring of 1913, before the rainy season.

Dodson had an automobile shipped in from some place, I think that was prior to the date he brought the automobile.

Q. You didn't take them after Mr. Dodson was arrested?

A. Not after that by the machine. His machine was left with me and I shipped it to Sacramento, I think. That is where it was shipped to by the orders of Mr. Dangberg. That is the machine Mr. Dodson had shipped in there. I fix it as being prior to the time Dodson shipped in the machine as his own, that I hauled them around there. The conversation that I recall between Mr. Dangberg and Dodson at any time on these trips, was that they were talking about these cattle that we would see on the range. I think the first ranches that the Highland Cattle Company were operating around Duncan or Lordsburg as their own,

(Testimony of B. B. Ownby.)

was the one they bought from Roberds on the Box M ranch. I think it was in the spring of 1913, they were operating it; it was about that time they bought it.

H. C. DAY, called as a witness on behalf of the defendants, being first duly sworn, testified on

Direct Examination

as follows:

I reside at Pasadena and have been engaged for thirty-one years in raising cattle on the range. I am familiar with the market value of cattle. I think the reasonable market value of range cattle in Duncan, Arizona, on the 25th of March, 1913, are about \$30.00. I am familiar with the market value of such lands as were possessed by Day and Foster around Lordsburg, and Duncan, in March, 1913. The land which we agreed to convey under the agreement which is marked "Defendant's Exhibit "R" was of the reasonable market value of about \$50,000. I met Mr. Lanneau and Mr. Dangberg and Mr. Foster the early part of June, 1913, in the back room of the Bank of Duncan. Mr. Dangberg asked me to release him from his contract to purchase the ranges and cattle. I told him we had entered into the contract in good faith and that we intended to carry out our part of it according to stipulation. I think I asked Mr. Dangberg if he had looked the ranges and cattle over and he said he had to some extent and had taken pains to post himself somewhat. I asked him why he had not talked to Foster about it and he said that Dodson had commenced the trade and he thought he had better let him finish it. I met Mr.

(Testimony of H. C. Day.)

Dangberg in Lordsburg, New Mexico, once after the time in June. That was sometime shortly before the 20th of June, 1913. Mr. Foster, Mr. Dangberg and myself were present. There was some talk about Dangberg, about his (Dangberg's) going on with the contract, provided he could borrow \$100,000 from me at six per cent. He did not say he would go on with the contract, but he asked if he could borrow that if he concluded to go on with the contract. I said I would let him have it if he had gilt edge security. He came down to the train when we took the train for Duncan. I don't recall any more of the conversation. I was willing and ready on the 20th day of June, 1913, to comply with the conditions on my part to be performed under the contract, defendant's exhibit "R." I took a great deal of pains to get the abstracts there in time. I went to the county seat myself to get them and everything was according to the contract on the 20th of June, 1913. None of the remaining \$230,000 has ever been tendered to me.

H. F. DANBERG, recalled for further

Cross-Examination,

testified as follows:

By Mr. Edwards:

Q. I show you, Mr. Dangberg, Plaintiff's Exhibit 4, and I will ask you if you supplied Mr. Dodson with that form of draft for his use prior to the first of March, 1913?

A. I don't know exactly the date.

Q. Well, prior to March 23, 1913?

(Testimony of H. F. Dangberg.)

A. I believe I did.

Q. I will ask if prior to March 23, 1913, you had forms of advice printed and supplied Mr. Dodson with these?

A. I did.

Q. What was the purpose of the advices?

A. To protect us in any draft drawn on the company, to have the advice come ahead of the draft.

Q. These were forms of receipts for him to obtain from the persons from whom he bought cattle or to whom he sold cattle, showing the amount?

A. It was for the purpose of protecting us in the matter of obtaining the money.

Q. So that you would know the correct amount that he had paid out?

A. Yes, sir.

Q. I will ask you at the time you testified before the *habeas corpus* proceedings of James Dodson, held June 13, 1913, in New Mexico—

The Court: He has testified that he remembers that occasion.

Q. By Mr. Edwards: I will ask you if you testified at that time as follows: I will bring this reporter's transcript by you so that you can see it: "Q. You have stated that Mr. Dodson at the time of this transaction to which you have testified and theretofore was acting as manager of the Highland Cattle Company. Is that correct? A. At what time? Q. At the time of the transaction you have testified to and theretofore. A. The transaction which we are speaking of now, he was manager of the company. Q. He had

(Testimony of H. F. Dangberg.)

authority to receive money? A. Yes, sir, in the name of the company, and transmit it to me. Q. He had no authority to pay out money? A. Upon drafts; upon advices sent to me, and secured by draft. “Q. How was that authority evidenced? A. It was delegated by the board of directors. Q. Is it entered upon the minutes of the corporation? A. It is—” Have you those minutes with you? A. I have not. “Q. Where are they? A. I think they are in San Francisco. Q. Have you a copy of them? A. I have not. Q. Are you able to produce them? A. I can. Q. Will you do so? A. I will as soon as I can. Q. I understand you to testify that according to these minutes his authority as manager in paying out money was strictly defined, as you have just stated to the best of my recollection. He was sent down there to conduct the business of this corporation in this region? A. He was. Q. And that business was to be the business of buying and selling cattle? A. Yes. Q. And his authority nevertheless was to receive money and not pay it out except upon a letter of advice and draft? A. A letter of advice,—he had a draft book,—and advice attached. Q. Then the draft and advice would go in the same letter? A. No, don’t misunderstand me. The advice and the draft are attached in the same book. Whenever he drew a draft the advice was to be forwarded to me as secretary, the draft came through the bank at Midon, and upon the invoice corresponding with the draft, the money was drawn. Q. That is, he would fill out a draft as required and send you an invoice, and hand the man he was paying the draft; that

(Testimony of H. F. Dangberg.)

is it, is it? A. Yes. Q. And the minutes specify, do they, that if the draft which came to you did not correspond with the invoice you received, you wouldn't pay it? A. It specified the means of doing business. Q. He had authority to pay out corporation money in drafts? A. Yes. Q. And he was not limited as to the things for which he was to pay, or was he? Did you specify what he was to pay for? A. That was to be an amount for his immediate personal expenses. For any deals. We are supposed to be thoroughly advised of these deals before paying out the draft. Q. Did the minutes recite that? A. I don't know as the minutes recited that. Q. What is the distinction you make for expenses and for deals he must draw on you? A. It was understood that he drew drafts and put the money there for the manager of the ranch. Mr. Roberts: Q. Who placed this money there for Mr. Roberts? A. I believe that Mr. Dodson did at times for expense account. Q. And he had authority as a matter of fact to pay ranch expenses? A. Sure. Q. Now, you stated it was understood that so and so and so and so was the case. What do you mean by that? It was understood in deals that he was to advise before he paid and in ordinary expenses he did not need to. How *as* that understood? A. He had previous authorization to pay off his ranch expenses. Q. How was that given? A. By the board of directors. A. Entered on their minutes? A. I believe so. Q. Have you read those minutes? A. I have. Q. You know whether that is there, don't you? A. I am the secretary of about 13

(Testimony of H. F. Dangberg.)

corporations and I don't know the exact wording and language of all the minutes. Q. What you are testifying to is merely from your recollection? A. To the best of my recollection. Q. When you say understand you mean Mr. Dodson understand so? A. I mean everybody understood so. I recollect these statements being set out, but the exact wording of them I can't express at this time. Q. Then at the meeting of the board of directors, it was discussed and settled that for deals he must get authority to pay out the money, but for the expenses he could pay the money. A. He had previous authority for going ahead for the expenses of running the ranch. For deals he had to be authorized. Q. He had authority to pay out ranch expense? A. Yes, indeed. Q. What was this supposed to be? A. For the running of various ranches bought out here about Lordsburg. Q. Salaries? A. Salaries. Q. Feed? A. Feed. Q. Anything else? A. Yes, their other ranch expenses besides that. Q. Now, what was this proposition of deals that you speak of? You say that in deals he was not authorized to pay out money without specific authority for each deal. What do you mean by deals? A. Purchase of cattle and ranches. Q. He was authorized to negotiate for and contract for the purchase of cattle and ranches, but he couldn't pay for them until he had been specifically authorized. A. That was, he presented the deal to the board of directors before the sale was consummated. It was that no one of the directors could do business without the knowledge of the rest of the directors. Mr. Dodson was one of the directors. Q.

(Testimony of H. F. Dangberg.)

And that the manager couldn't do business in buying and selling ranches and cattle without the authority of the board of directors? A. Without a subsequent authorization or knowledge of the board of directors.

Q. Do you mean by that he couldn't do it without a subsequent ratification, that you told him to go ahead and deal, and that if it suited you, you would ratify, and if not, it was up to him? A. No, sir.

Q. What do you mean by saying that he couldn't do business without subsequent ratification? A. He could look up deals and seek such deals, but no deals to be consummated without the full knowledge of the board of directors.

Q. He couldn't enter into deals at all? A. He could look them up.

Q. But he couldn't contract in the name of the corporation? A. Couldn't close a deal without knowledge of the board of directors.

Q. Couldn't contract without the authority of the board? A. He couldn't go ahead and complete a deal without the authority coming from a board of directors. He could look up his deals but he couldn't complete his deals without the knowledge of his board of directors.

Q. What is complete it? A. Paying for it.

Q. Then he could— He had a right to take money in the name of the corporation? A. Not himself, but in the name of the corporation.”

Did you so testify at that time?

A. I believe I did.

Q. And that was true?

A. Yes.

Q. Mr. Dangberg, we have one of the originals of

(Testimony of H. F. Dangberg.)

the Metzel contract, and here is the other one that you did not introduce. That is the original.

A. Yes, sir; with the notations on there.

Mr. Edwards: We offer this in evidence.

The Clerk: Defendant's Exhibit V.

Q. By Mr. Edwards: In this Metzel contract there are four brand marks. Will you decipher those for our benefit?

A. Lazy B, Box M, Pat Wrench, and the Long S, or Lazy S.

Q. That is, reading them from left to right?

A. Yes.

Q. Which of those brands did you acquire from other than the Lazy B people?

A. The Box M and the Pat Wrench and Lazy S.

Q. From whom were they acquired?

A. From Robinson and Wilson deals.

Q. And you had no other cattle than what you acquired from Robinson and Wilson at this time?

A. None whatever.

Q. And the cattle which you contemplated delivering—

A. I think we had other brands than are enumerated on there.

Q. But no other cattle except what you got from them?

A. None other.

Q. The cattle that you contemplated selling under this Metzel contract were these cattle that you mentioned and the cattle that you were acquiring from the Lazy B people?

(Testimony of H. F. Dangberg.)

A. Yes.

Q. How many cattle did you have down there from the Wilson and Robinson outfit in 1913?

A. In the neighborhood of 3000, to the best of my recollection.

Q. And the Metzel contract called for how many cattle?

A. I forget now. Somewhere in the neighborhood of 4000, I think.

Mr. Edwards: That is all.

Redirect Examination

By Mr. Sims:

Q. This Metzel-Kidwell contract original here—you did not see these until you were down in May, 1913?

A. Not until the investigation down there. We saw a seller's contract.

Q. Do you remember about when was the first time you saw this original?

A. About the 26th of May. Between the 23rd and 26th of May.

Q. Mr. Edwards read you a long list of questions and answers that you made in a preliminary hearing in the criminal matter of Dodson, and in one of the questions you stated that the by-laws authorized Mr. Dodson to send money down there. Was that correct?

A. That was not correct.

Q. You did not have the by-law book?

A. No, I went back and read the by-law book afterwards and found that I was wrong in that statement.

(Testimony of H. F. Dangberg.)

Q. So you were wrong in that statement down there?

A. I was wrong in that statement at the investigation or trial.

Mr. Sims: I think that is all.

Recross-Examination

By Mr. Edwards:

Q. Wherein did the contract that you speak of as the bogus Metzler contract differ from the genuine?

A. The bogus contract, that is, the one that we had the carbon copy of, was a seller's contract, and the contract that we found on investigation was a buyer's contract.

Q. You mean one was the seller's cut and the other the buyer's cut?

A. Yes.

Q. But the amounts of cattle and the brands of cattle and everything else was the same in the two?

A. As to the exact comparison, I am not prepared to say.

Q. Have you those bogus copies with you?

A. I don't know, but I think they are here.

Q. The fact is that the bogus contract shows that there was a contract entered into by Dodson as manager of the Highland Cattle Company, isn't it, as this reads?

A. Yes.

Q. And the amount of cattle and the brands were the same?

A. Practically the same, excepting as to the cut.

(Testimony of H. F. Dangberg.)

Q. The Lazy B brand was specified in each of them?

A. To the best of my recollection; yes.

Q. And you understand that this writing shows that you paid the Metzger people some money to release you from this contract?

A. That is so.

Mr. Edwards: That is so.

H. C. DAY, recalled as a witness for defendants, on
Direct Examination

testified as follows:

I never counted the cattle on our range in thirty-one years; it would probably take three years to count them all, we would have to attend all the roundups for three years. The estimate is arrived at by the number of calves branded each year. Different parties have different estimates, from four to five times as many as the calves that you brand.

S. A. FOSTER, recalled as a witness on behalf of defendants, testified on

Direct Examination

as follows:

I know of the ranch that was reputed to be run by the Highland Cattle Company down near Lordsburg and Duncan in February and March, 1913. The foreman of that ranch, or manager of the ranch, was named Roberds. Dodson stayed in town and told Roberds what to do—he was at El Paso *to*.

I was not informed by any one that Humphreys and

(Testimony of S. A. Foster.)

Dangberg were down in Duncan sometime in February or March, 1913. I was not told that they wanted to see me—not that I remember of.

FRANK V. HUMPHREY, recalled as a witness for the plaintiff, testified in rebuttal on

Direct Examination

as follows:

I heard the testimony of Mr. Foster about the conversation that he had about not shipping any cattle and about the Kidwell contract. I met Mr. Foster on this ranch and went out in a machine and they had a herd of cattle rounded up. It may be one day prior to the 23rd day of May, when the Kidwell contract was cancelled, or it may be on the morning of that day. I met Mr. Foster near Adobe. They had some cattle rounded up near Adobe. I told Mr. Foster that I thought as we had found out that the contract was buyer's cut, after we straightened up with the purchasers of the cattle and let them loose, as if we let them cut the cows, they would cut our best breeding cows and we would have nothing left on the ranch. In the conversation I had at that time I did not ask him to pay back \$20,000; it was never mentioned.

Cross-Examination.

I was suspicious about the Lazy B contract at that time, but of course I did not know anything about it as yet. I did not know anything that was wrong at that time. I did not know that the contract was not for nine thousand and I did not know that they did not have 9,000 head of cattle, it was only hearsay.

(Testimony of Frank V. Humphrey.)

People said they did not think they had that many cattle, *in* heard people talking in that respect. I did think there was something wrong with the Lazy B trade. I thought there was something wrong with the trade on account of the others that we found. I think it was perhaps a week previous to that that I thought there was something wrong with all of the trades. I wired Mr. Dangberg to come there. I wired him that I thought there was something wrong with the Lazy B trade. I don't remember mentioning the number of cattle; possibly I did. I said there was something wrong with the trade. I remember that I thought the Lazy B trade was wrong also.

Wherefore, the plaintiff herein, hereby presents to the court the foregoing amended bill of exceptions and prays that the same be settled, allowed and filed as plaintiff's bill of exceptions.

OLIN WELLBORN, JR.,
WM. M. SIMS,
MADISON MARINE,

Attys. for Plaintiff.

Pursuant to the stipulation of the parties hereto, signed by their counsel of record and heretofore filed herein, the foregoing is hereby certified by me as being correct and is allowed as the engrossed bill of exceptions in said case, to be used upon writ of error or proceedings to be taken herein.

Dated this 6th day of March, 1917.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: Civil No. 299. In the District Court of the United States, in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, copartners doing business under the firm name and style of Day and Foster, defendants. Amended Bill of Exceptions. Receipt of a copy of the within is hereby admitted this 28th day of December, 1916. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt & LeRoy M. Edwards. Filed Feb. 5, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Wm. M. Sims, Madison Marine and Olin Wellborn, Jr., attorneys for plaintiff.

In the District Court of the United States in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY and FOSTER,

Defendants.

Stipulation.

It is hereby stipulated and agreed, that the bill of exceptions on file in said action, may be presented to the court for allowance and settlement on the 13th day of February, 1917, at the hour of ten o'clock

a. m., thereof, or as soon thereafter as said matter may be presented to the court; and

It is further stipulated and agreed that the bill of exceptions on file herein may be approved and allowed by the court without objection.

Dated this 12th day of February, 1917.

OLIN WELLBORN, JR.,

WM. M. SIMS,

MADISON MARINE,

Attorneys for Plaintiff.

J. H. MERRIAM,

JOSEPH L. LEWINSOHN,

HUNSAKER & BRITT and

LEROY M. EDWARDS,

Attorneys for Defendant H. C. Day.

So ordered.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: Civil No. 299. In the United States District Court, Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendants. Stipulation that bill of exceptions may be presented to court for allowance and settlement. Filed Feb. 17, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806-8 Security Bldg., Los Angeles, Cal.

Civil No. 299.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

H. F. DANBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY and FOSTER,

Defendants.

Petition for Appeal.

To the Honorable Oscar A. Trippet, Judge:

The above named plaintiff, H. F. Dangberg Land and Livestock Company, a corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 19th day of September, 1916. does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record of the proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such cases made and provided.

And your petitioner further prays that the proper

order relating to the required security to be required of it be made.

WM. M. SIMS,
MADISON MARINE,
OLIN WELLBORN, JR.,
Attorneys for Petitioner.

[Endorsed]: Civil No. 299. In the District Court of the United States in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendants. Petition for Appeal. O. K. Mar. 5, 1917. Hunsaker & Britt and LeRoy M. Edwards, by Smith. Filed Mar. 5, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, Cal.

Civil No. 299.

In the District Court of the United States in and for the Southern District of California, Southern Division.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY & FOSTER,

Defendants.

Assignment of Errors.

Now comes the plaintiff in the above entitled cause, and files the following assignment of errors, upon which it will rely upon its prosecution of the writ of error in the above entitled cause, from the decree made by this honorable court on the 19th day of September, 1916.

I.

That the United States District Court for the Southern District of California erred in sustaining the defendant's motion to strike out the testimony of H. F. Dangberg, witness for plaintiff, relating to Dodson's conversation with him concerning the agreement to purchase the "Lazy B. outfit."

II.

That the United States District Court for the Southern District of California erred in sustaining the defendants' motion to strike out *out* the testimony of H. F. Dangberg, witness for plaintiff, relating to Dodson's conversation with him concerning the agreement to purchase the "Lazy B. outfit," in which he stated that Mr. Dodson said that "this" (referring to receipt of date March 25, 1913, signed Day and Foster, Seller, J. C. Dodson, Buyer,) was a carbon copy of an original that was in the Bank of Duncan, purporting to be a trade or option that he had taken with the Day and Foster people on the "Lazy B. outfit," and that said court further erred in ruling out the offer of the plaintiff to establish by witness Dangberg the fact that Dodson in the presence of Mr. Humphrey and Mr. Dangberg handed to them this receipt and stated at that

time that that was a carbon copy of an original which was on file in escrow with the Bank of Duncan.

III.

That the United States District Court for the Southern District of California erred in sustaining objection to the question asked F. E. Humphrey, a witness for plaintiff, as to what, if anything, Dodson had said to him concerning the contract to purchase the "Lazy B outfit" from the defendants; and that the court further erred in sustaining the objection of defendants to the following questions asked the witness F. E. Humphrey on direct examination, to-wit: "Prior to seeing that document (referring to receipt above referred to) on that date did you have any conversation with Dodson relative to the "Lazy B." deal? A. Yes, we did. Q. What was the conversation, what did he say and what did you say at that time before you saw this document?" That the court further erred in sustaining defendants' objection to the following question asked of the said witness, to-wit: "What, if anything, did Dodson say relative to the document (referring to the above receipt)? That the court further erred in sustaining the objection of defendants to plaintiff's offer in evidence, of said receipt marked defendants' Exhibit "Q."

IV.

That the evidence was and is insufficient to justify finding No. 2, which finds that "During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the state of New Mexico and in Arizona. That for several months prior

to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was the vice-president of the said Highland Cattle Company, also a director and large stockholder therein, and was resident agent of said Highland Cattle Company in the state of New Mexico, and was manager of its business in the said states of New Mexico and Arizona and during all of the aforesaid times was acting as the manager of all its business in the states of New Mexico and Arizona."

V.

That the evidence was and is insufficient to justify finding No. 3, which finds that "On or about the 25th day of March, 1913, the Highland Cattle Company, a corporation, by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day and Foster, which said contract was and is in the words and figures as follows:

"This agreement made this twenty-first day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee county, state of Arizona, by S. A. Foster, agent of said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, party of the second part.

Witnesseth: That for and in consideration of the sum of twenty thousand and 00/100 (\$20,000.00) dollars, lawful money of the United States, in hand paid to the party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the part here-

by grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of two hundred and thirty thousand & 00/100 (\$230,000.00) dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

Said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER,
S. A. FOSTER,
J. C. DODSON,
Manag. Highland Cattle Co.

State of Arizona, County of Greenlee—ss.

Before me, B. R. Lanneau, a notary public, in and for the county of Greenlee, state of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster, and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.

B. R. LANNEAU,
Notary Public.”

VI.

That the evidence was and is insufficient to justify finding No. 6, which finds “that each and all of the allegations set forth in paragraph numbered XIV of plaintiff’s amended complaint are untrue; and the court finds that the said J. C. Dodson at the time he entered into said contract of March 25, 1913, did have the authority to enter into same for and on behalf of the said Highland Cattle Company.”

VII.

That the evidence was and is insufficient to justify finding No. 8, which finds “that the Highland Cattle Company paid to said Day and Foster \$20,000.00 as a part payment under and according to the terms of the aforesaid contract of March 25, 1913, and that said payment was not made by the Highland Cattle Company to the said Day and Foster by reason of any mis-

take upon the part of the said Highland Cattle Company, concerning said contract or its terms.”

VIII.

That the evidence was and is insufficient to justify finding No. 10, which finds “that neither the sum of \$20,000.00 nor any other sum is due or owing or unpaid from the defendant H. C. Day to the plaintiff.”

Wherefore, the appellant prays that said decree be reversed, and that said District Court for the Southern District of California be ordered to enter a decree reversing the decision of the lower court in said cause.

WM. M. SIMS,
MADISON MARINE,
OLIN WELLBORN, JR.,

Attorneys for Plaintiff and Appellant.

[Endorsed]: Civil No. 299. In the District Court of the United States in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendants. Assignment of Errors. Received copy of the within this 5th day of March, 1917. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt, LeRoy M. Edwards, attorneys for defendant. Filed Mar. 5, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, Cal., attorney for plaintiff.

Civil No. 299.

*In the District Court of the United States, in and
for the Southern District of California, Southern
Division.*

H. F. DANGBERG LAND & LIVESTOCK COM-
PANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing
business under the firm name and style of
DAY & FOSTER,

Defendants.

Order.

On motion of Olin Wellborn, Jr., Esq., solicitor and
counsel for complainant, it is hereby ordered that an
appeal to the United States Circuit Court of Appeals
for the Ninth Circuit, from a decree heretofore filed
and entered herein, be, and the same is, hereby allowed,
and that a certified transcript of the record testimony,
exhibits, stipulations, and all proceedings, be forthwith
transmitted to said United States Circuit Court of
Appeals.

It is hereby further ordered, that the bond on ap-
peal be fixed at the sum of two hundred & fifty dollars.

Dated this 14 day of March, 1917.

TRIPPET,

Judge.

[Endorsed]: Original. Civil No. 299. In the Dis-
trict Court of the United States in and for the South-
ern District of California, Southern Division. H. F.
Dangberg Land & Livestock Company, plaintiff, vs.

H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster, defendants. Order. Received copy of the within order this 14th day of March, 1917. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt and LeRoy M. Edwards, by Smith, attorneys for defendants. Filed Mar. 14, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, California.

30441-17.

United States Fidelity and Guaranty Company.

Capital Paid in Cash \$2,000,000.

Total Resources over \$6,000,000.

Home Office: Baltimore, Md.

*In the District Court of the United States for the
Southern District of the State of California.*

H. F. DANBERG LAND AND LIVESTOCK COM-
PANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing
business under the firm name and style of
DAY and FOSTER,

Defendants.

Whereas, in an action in the District Court of the United States for the Southern District of the state of California, a judgment was, on the 19th day of September, 1916, made, entered and filed by the said court in favor of the defendant, and against the plaintiff, and

Whereas, the said plaintiff is dissatisfied with the

said judgment, and is desirous of appealing therefrom to the United States Circuit Court of Appeals, 9th Judicial Circuit;

Now, therefore, in consideration of the premises, and of such appeal, the United States Fidelity & Guaranty Company, a corporation, having its principal place of business in the city of Baltimore, state of Maryland, and having a paid-up capital of two million dollars, duly incorporated under the laws of the state of Maryland, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the state of California respecting such corporations, does hereby undertake in the sum of two hundred and fifty dollars, and promise on the part of the appellant that said appellant will pay all damages and costs which may be awarded it on said appeal or on a dismissal thereof, not exceeding the aforesaid sum of two hundred and fifty dollars, to which amount it acknowledges itself bound.

Dated at San Francisco this 29th day of March, A. D. 1917.

UNITED STATES FIDELITY & GUARANTY CO.

By H. V. D. JOHNS,

By W. S. ALEXANDER,

Attorneys in Fact.

[United States Fidelity & Guaranty Company. Incorporated 1896.]

Approved 4/5/17.

TRIPPET,

Judge.

State of California, City and County of San Francisco—ss.

On this 29th day of March, in the year one thousand nine hundred and 17, before me, M. J. Cleveland, a notary public in and for the city and county of San Francisco, personally appeared H. V. D. Johns and W. S. Alexander, personally known to me to be the persons whose names are subscribed to the within instrument, as the attorneys in fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and their own names as attorneys in fact.

(Seal)

M. J. CLEVELAND,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: 299 Civil. In the District Court of the United States for the Southern District of the state of California. H. F. Danberg Land and Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendant. Appeal Bond. Filed Apr. 4, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk.

Civil No. 299.

*In the District Court of the United States, in and
for the Southern District of California, Southern
Division.*

H. F. DANGBERG LAND & LIVESTOCK COM-
PANY,

Plaintiff,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing
business under the firm name and style of
DAY and FOSTER,

Defendants.

Praeceptum for Transcript.

To the Clerk of the Above Entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the appeal heretofore perfected to said court and include in said transcript the following pleadings, proceedings and papers on file, to-wit: Complaint, the defensive pleadings and joining of issue; findings of fact and conclusions of law, judgment of the court, opinion of the court, bill of exceptions, petition for writ of error; assignment for writ of errors; order allowing the writ of errors; the writ of errors and the citation.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

OLIN WELLBORN, JR.,

WM. M. SIMS,

Attorneys for Plaintiff.

[Endorsed]: Civil No. 299. In the District Court of the United States, in and for the Southern District of California, Southern Division. H. F. Dangberg Land & Livestock Company, plaintiff, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster, defendants. Praecipe for Transcript. Received copy of the within this 16 day of April, 1917. J. H. Merriam, Joseph L. Lewinsohn, Hunsaker & Britt & LeRoy M. Edwards, attys. for deft. Day. Filed Apr. 19, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, Cal., attorney for plaintiff.

United States Circuit Court of Appeals for the Ninth Circuit.

H. F. DANGBERG LAND & LIVESTOCK COMPANY,

Plaintiffs in Error,

vs.

H. C. DAY and S. A. FOSTER, co-partners, doing business under the firm name and style of DAY and FOSTER,

Defendants in Error.

Civil No. 299.

Order Extending Time to File Transcript on Appeal.

Good cause appearing therefor, it is hereby ordered that the time within which the plaintiffs in error in the above entitled action may file transcript on appeal, or the record thereof and docket said cause in the United

States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to and including the 2nd day of June, 1917.

Los Angeles, May 2, 1917.

TRIPPET,

District Judge.

[Endorsed]: No. Civil 299. In the United States Circuit Court for the Ninth Circuit. H. F. Dangberg Land and Livestock Company, plaintiffs in error, vs. H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day and Foster, defendants in error. Order extending time to file transcript or record on appeal. Olin Wellborn, Jr., 806 Security Bldg., Los Angeles, Calif., attorney for plaintiff.

